(15)

No. 97-581-CSX Title: Pennsylvania Board of Probation and Parole, Petitioner
v.
Keith M. Scott

Docketed:
October 2, 1997 Court: Supreme Court of Pennsylvania, Middle District

Entry	Date	Proceedings and Orders
	Sep 30 1997	Petition for writ of certiorari filed. (Response due November 1, 1997)
	Oct 30 1997	Brief of respondent Keith Scott in opposition filed.
	Oct 30 1997	Motion of respondent for leave to proceed in forma pauperis filed.
	Nov 3 1997	Brief amici curiae of Ohio, et al. filed.
	Nov 12 1997	DISTRIBUTED. November 26, 1997
	Nov 26 1997	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Nov 26 1997	Petition GRANTED. limited to Question 1 presented by the petition. In addition to this question, the parties are invited to brief and argue the following question: Must a search of a parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole? The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 9, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 6, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 6, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT March 30, 1998. **********
	Jan 6 1998	Brief amici curiae of Americans for Effective Law Enforcement, Inc., et al. filed.
	Jan 8 1998	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Jan 9 1998	Joint appendix filed.
	Jan 9 1998	Brief of petitioner Pennsylvania Board of Probation and Parole filed.
	Jan 9 1998	Brief amici curiae of Center for the Community Interest, et al. filed.
	Jan 9 1998	Brief amicus curiae of United States filed.
	Jan 9 1998	Brief amici curiae of Ohio, et al. filed.
	Jan 23 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jan 30 1998	Record filed.
	Feb 2 1998	Brief amici curiae of ACLU, et al. filed.
	Feb 4 1998	Brief of respondent Keith M. Scott filed.
	Feb 23 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

3 pp

No. 97-581-CSX

Entry	Date	Proceedings and Orders
	Feb 23 1998	CIRCULATED.
	Mar 6 1998	Reply brief of petitioner Pennsylvania Board of Probation and Parole filed.
	Mar 30 1998	ARGUED.

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

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No. 97- OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1997

PENNSYLVANIA BOARD OF
PROBATION AND PAROLE,
Petitioner

v.

KEITH M. SCOTT,
Respondent

PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari
to the Supreme Court of Pennsylvania

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62 pp

QUESTIONS PRESENTED

1. Whether the exclusionary rule applies to parole revocation proceedings?

2. Whether a parolee has a reasonable expectation of privacy, entitled to Fourth Amendment protection, when he consents to a search of his residence as a condition of accepting parole?

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Petitioner is the Pennsylvania Board of Probation and Parole, an agency of the government of the Commonwealth of Pennsylvania. Respondent is Keith M. Scott.

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OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported at 698 A.2d 32 (1997) and is reprinted in the Appendix at 1a. The opinion and order of the Commonwealth Court of Pennsylvania are reported at 668 A.2d 590 (1995),[1] and are reprinted in the Appendix at 19a.

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[1]Between the time that the Commonwealth Court panel issued its decision (November 30, 1995) and the time that the Supreme Court of Pennsylvania issued its decision in this case (July 3, 1997), the Commonwealth Court issued a decision *en banc* which overruled its decision in this case and held that the exclusionary rule does not apply to parole revocation proceedings. Pet. App. 6a. *See Kyte v. Pennsylvania Board of Probation and Parole*, 680 A.2d 14, 18 n.8 (Pa. Cmwlth Ct. 1996) (en banc).

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Pennsylvania was filed on July 3, 1997, and this petition for writ of certiorari has been filed within ninety days of that date. The Court has jurisdiction to review the decision of the state supreme court pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." *U.S. Const. Amend. IV.*

STATEMENT OF THE CASE

The issue in this case is whether the exclusionary rule should apply to bar evidence of parole violations in the context of a state parole board's decision whether to revoke the parole of a convicted offender. The Supreme Court of Pennsylvania has held that, despite the administrative nature of parole revocation proceedings and despite the parolee's execution of a written consent to search his residence at any time, where a parole agent "has reason to be aware" of the parolee's status, he or she "must have reasonable suspicion of a parole violation" in order to conduct a search and, furthermore, if the administrative record does not adequately support reasonable suspicion, the exlcusionary rule will apply in the parole revocation hearing to bar evidence supporting violations of conditions of parole. Pet. App. 16a-17a. This decision is in conflict with decisions from other jurisdictions, both state and federal, and presents a significant issue that has not been addressed by the Court. The Court should therefore take this opportunity to resolve the issue which is important to the functioning of state parole boards across the country.

1. On September 1, 1993, respondent Scott was paroled by the Pennsylvania Board of Probation and Parole ("Board") from a 10-20 year term of imprisonment for conviction of third degree murder. Pet. App. 1a, 19a. As a condition of accepting parole, Scott signed an agreement expressly consenting to the search of his person, property or residence by Board agents without a warrant. Pet. App. 2a, 30a n.3. On February 4, 1994, the Board issued a warrant to detain Scott, together with a notice charging him with violations of the terms and conditions of his parole. Pet. App. 19a-20a. Among the conditions alleged by the Board to have been violated was the prohibition against the ownership or possession of any firearms or other weapons. Pet.

App. 20a. This violation was supported by three counts, one of which charged that on February 4, 1994, several weapons — including three shotguns, a semi-automatic rifle, and a bow and arrows — were found in Scott's residence by parole agents. Pet. App. 20a.

At the parole revocation hearing, Scott argued that the parole agents' search of his residence violated his Fourth Amendment right to be free from unreasonable searches and seizures. Pet. App. 3a-4a. The hearing examiner overruled Scott's objection to introduction of the evidence obtained from the parole agents' search. The testimony revealed that parole agents had obtained a key to his residence from Scott, entered the residence in the presence of a friend of Scott's, asked the friend to telephone Scott's mother (who owned the residence) and, after the mother's arrival, searched Scott's bedroom and common areas. Pet. App. 2a-3a. The search revealed the shotguns, rifle, and bow and arrows in a room next to Scott's bedroom on the second floor of the house. Pet. App. 3a. The Board relied in part on the evidence obtained from the search when it revoked Scott's parole. Pet. App. 5a.

2. On appeal to the Commonwealth Court of Pennsylvania,[2] Scott raised a number of issues including the argument of a Fourth Amendment violation. A panel of the Commonwealth Court concluded that, although parole revocation proceedings are administrative functions and not criminal prosecutions, a parole agent may not conduct a warrantless search of a parolee's residence in the absence of

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[2]The Commonwealth Court is the intermediate appellate court in Pennsylvania vested with jurisdiction to hear appeals from state administrative agencies, including the Board of Probation and Parole. *See* 42 Pa. Cons. Stat. §763 .

consent of the owner or what it termed a "statutory or regulatory framework that satisfies the reasonableness requirement of the Fourth Amendment." Pet. App. 29a. Declaring that Scott's previously-executed written consent to a search of his residence and consent to seizure of items found by parole agents did not comport with the Fourth Amendment, the Commonwealth Court decided that Scott's Fourth Amendment rights had been violated. Pet. App. 30a-31a. The court went on to hold that the exclusionary rule should apply to parole revocation hearings, Pet. App. 37a, and that it was "necessary" to apply it to the weapons seized from Scott's residence. Pet. App. 37a. As a result, the court decided that the hearing examiner should have excluded evidence concerning the weapons, and it reversed the parole revocation decision and remanded the matter for a new revocation hearing. Pet. App. 37a.

3. The Board then petitioned the Supreme Court of Pennsylvania for allowance of appeal to address the Fourth Amendment issue, and the state supreme court granted the petition.[3] Between the state supreme court's granting of the petition and its decision from which certiorari now is sought, the Commonwealth Court issued a decision *en banc* which overruled its panel decision in this case. *See Kyte v. Pennsylvania Board of Probation and Parole*, 680 A.2d 14, 18 n. 8 (Pa. Cmwlth. Ct. 1996) (en banc). The Board brought this intervening decision to the attention of the state supreme court and requested the court to remand this case to the Commonwealth Court. The state supreme court denied the request and proceeded to decide the appeal.

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[3]Under Pennsylvania law, the state supreme court's decision whether to accept an appeal from an intermediate appellate court, in a matter originally commenced in an administrative agency, is a discretionary decision. *See* 42 Pa. Cons. Stat. §724 .

The state supreme court affirmed the panel decision of the Commonwealth Court. Pet. App. 1a. The court held that Scott "has a Fourth Amendment right against unreasonable searches and seizures that is unaffected by his signing of the consent to search provision" when he was paroled. Pet. App. 10a. The court then went on to consider whether the exclusionary rule should apply to bar introduction of the evidence obtained from Scott's residence. While recognizing that a majority of the United States Courts of Appeals have concluded that the exclusionary rule is inapplicable to parole revocation proceedings, *id.* at 12a - 13a, and that this Court has yet to address the issue, *id.* at 13a n. 8, the state supreme court nonetheless concluded that "there is a need to apply the exclusionary rule to the [parole] revocation process since otherwise there is nothing to deter a parole agent from conducting an illegal search or engaging in other illegal activity to obtain evidence." Pet. App. 15a. Thus, notwithstanding Scott's written consent to searches by parole agents as a condition of his parole, and notwithstanding the settled differences between a criminal prosecution and an administrative parole revocation, the state supreme court concluded:

> In the Fourth Amendment context, when an officer is aware or has reason to be aware of a suspect's [*sic*] parole or probationary status, he must have reasonable suspicion of a parole violation in order to conduct a search. If a reasonable suspicion does not exist, the exclusionary rule will apply in the parole revocation hearing. This holding modifies our *per se* bar against the application of the exclusionary rule in parole revocation hearings . . . and applies the exclusionary rule in revocation hearings when the officer who

engaged in the misconduct is aware of the parolee's status.

Pet. App. 16a-17a (footnotes omitted). The court then held that the exclusionary rule applied to Scott's parole revocation hearing and that the evidence obtained from the search of his residence should be suppressed.[4] Pet. App. 17a.

[4]The court specifically stated that its decision was "premised solely upon federal constitutional grounds," and it left "for another day" the question of the applicability of Pennsylvania's constitutional counterpart to the Fourth Amendment. Pet. App. 17a n.13.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA CONFLICTS WITH DECISIONS FROM OTHER STATES AND WITH DECISIONS FROM UNITED STATES COURTS OF APPEALS.

The Pennsylvania Supreme Court's decision places it squarely at odds with the Third Circuit Court of Appeals on the federal constitutional issue whether the exclusionary rule applies to parole revocation hearings. This reflects a conflict nationally among the federal courts of appeals and among the state courts as well.

As the decision of the state supreme court itself recognizes, its conclusion that the exclusionary rule should apply to the administrative function of parole revocation places it in conflict with a majority of the United States Courts of Appeals that have addressed the issue.[5] Pet. App. 12a.. It also places it in conflict with numerous decisions from other states.[6] By

[5]*See, e.g., United States v. Bazzano*, 712 F.2d 826 (3d Cir. 1983) (in banc), *cert. denied sub nom. Mollica v. United States*, 465 U.S. 1078 (1984); *United States v. Finney*, 897 F.2d 1047 (10th Cir. 1990); *United States v. Frederickson*, 581 F.2d 711 (8th Cir. 1978); *United States v. Vandemark*, 522 F.2d 1019 (9th Cir. 1975); *United States v. Farmer*, 512 F.2d 160 (6th Cir. 1975); *United States v. Brown*, 488 F.2d 94 (5th Cir. 1973); *United States v. Hill*, 447 F.2d 817 (7th Cir. 1971); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970).

[6]*See* cases collected at Pet. App. 35a.

contrast, the Courts of Appeals of two circuits, the Second and Fourth, have adopted a position similar to that of the Pennsylvania Supreme Court. *See United States v. Rea*, 678 F.2d 382 (2d Cir. 1982); *United States v. Workman*, 585 F.2d 1205 (4th Cir. 1978).

Nowhere is the conflict more acute than in the Third Circuit. In *United States v. Bazzano*, 712 F.2d 826 (3d Cir. 1983) (in banc), *cert. denied sub nom. Mollica v. United States*, 465 U.S. 1078 (1984), the Court of Appeals for the Third Circuit — the Circuit, of course, in which Pennsylvania is located — held *en banc* that the Fourth Amendment's exclusionary rule does not apply in probation revocation proceedings. The Third Circuit stated:

> [W]e are persuaded by the reasoning of those courts that have refused to apply the exclusionary rule in probation revocation proceedings. In our view, excluding from such proceedings reliable evidence bearing on a probationer's rehabilitation would contribute little to deterring constitutional violations while impeding society's interest in protecting itself against convicted criminals who have abused the liberty afforded them.

712 F.2d at 831 (Opinion of Garth, J., adopted by majority of Court *per curiam*).

Thus, while the Court of Appeals for the circuit in which Pennsylvania is located has refused to apply the exclusionary

rule to revocation proceedings,[7] the Supreme Court of Pennsylvania has held the opposite.

The Court should review this case in order to resolve the conflict among the federal and state courts.

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[7]The decision in *Bazzano* concerned probation revocation proceedings, but the Court often has recognized the similarities between probation and parole in its analysis of constitutional requirements. *See, e.g., Black v. Romano*, 471 U.S. 606, 613 (1985); *Gagnon v. Scarpelli*, 411 U.S. 778, 787-90 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 489-90 (1972).

II. THE QUESTION WHETHER THE EXCLUSIONARY RULE SHOULD APPLY TO PAROLE REVOCATION DECISIONS IS AN IMPORTANT ONE THAT SHOULD BE ADDRESSED BY THE COURT.

While the state supreme court's decision in this case purported to recognize the important distinction between the constitutional rights of a criminal defendant and the limited rights of a parolee, its decision has obscured the distinction. By making the need for a search warrant depend on the knowledge of the parolee's status by the parole agent, the decision has ignored the purpose of the parole revocation proceeding and unnecessarily superimposed on the revocation process protections reserved for a criminal prosecution. Because the Court has not addressed this issue, and it is an important one, the Court should grant the petition for writ of certiorari.

Although the Fourth Amendment generally proscribes searches conducted outside the judicial process, the Court has recognized exceptions when "special needs, beyond the normal need for law enforcement," make the judicial cause requirement impracticable or unnecessary. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (search of probationer's home); *New York v. Burger*, 482 U.S. 691, 699-703 (1987) (search of premises of highly regulated business); *O'Connor v. Ortega*, 480 U.S. 709, 721-25 (1987) (work-related search of employee's desk); *New Jersey v. T.L.O.*, 469 U.S. 325, 337-42 (1985) (search of student's property by school officials); *Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984) (search of prisoner's cell); *Bell v. Wolfish*, 441 U.S. 520-558-60 (1979) (body cavity search of inmate).

Thus, as the Court often has stated, the exceptions to the Fourth Amendment's warrant requirement turn on whether a person has a "constitutionally protected reasonable expectation of privacy," *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring), which calls for a two-part inquiry: whether the individual has manifested a subjective expectation of privacy in the object of the challenged search, and whether society is willing to recognize that expectation as reasonable. *California v. Ciraolo*, 476 U.S. 207, 211 (1986).

In the present situation, the state supreme court misapprehended both parts of the inquiry. The "essence" of parole is release from prison, before completion of the sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). In exchange for early release from prison into the community, a parolee such as Scott agrees to abide by certain conditions of parole, a violation of which permits society through its governmental representatives to reincarcerate the violator. There is, of course, no requirement that a parolee accept the parole conditions; he is free to reject the conditions and serve out his prison term. Scott in this case not only agreed to certain conditions of parole but he also gave his written consent to a warrantless search of his person, property and residence by agents from the Board. Pet. App. 1a-2a. These types of conditions are no different than conditions requiring drug and alcohol treatment, mental health treatment or other rehabilitative programming, all of which indicate diminished privacy expectations by a parolee over his conduct and his person. More importantly, they demonstrate that society is unwilling to release offenders before the expiration of their prison term unless certain conditions are met. *Morrissey*, 408 U.S. at 478-79.

Furthermore, as the Court has recognized, the government has an overwhelming interest in being able to return a parolee to imprisonment without the burden of a new adversarial criminal trial if the parolee has failed to abide by the conditions of parole. *Morrissey*, 408 U.S. at 480. Indeed, the Court repeatedly has stated that the decision to revoke probation or parole is an administrative one; it should be a flexible and informal process that "does not require the full panoply of procedural safeguards associated with a criminal trial." *Black v. Romano*, 471 U.S. at 613. *See also Gagnon*, 411 U.S. at 787-90; *Morrissey*, 408 U.S. at 489-90. By superimposing Fourth Amendment jurisprudence -- with the exclusionary rule and its exceptions -- onto what should be a purely administrative decision, the state supreme court has embarked down the path of converting what is an informal information-gathering proceeding into an adversarial trial. By holding that the exclusionary rule applies to what should be a "predictive and discretionary" process, the state supreme court has changed the role of the hearing body to one "more akin to that of a judge at trial, and less attuned to the rehabilitative needs of the individual probationer or parolee." *Gagnon*, 411 U.S. at 787-88.

The Court's decisions do not support this departure. The Court thus should grant this petition to determine the important question whether the exclusionary rule should apply to parole revocation decisions.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari and, upon review, reverse the decision of the Supreme Court of Pennsylvania.

Respectfully submitted,

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Keith M. SCOTT, Appellee,
v.
PENNSYLVANIA BOARD OF PROBATION AND PAROLE, Appellant.

Supreme Court of Pennsylvania.

Submitted Sept. 16, 1996.

Decided July 3, 1997.

Before FLAHERTY, C.J., and ZAPPALA, CAPPY, CASTILLE and NIGRO, JJ.

OPINION

ZAPPALA, Justice.

This appeal presents the issue of whether a parolee who consents to warrantless searches as a condition of parole is entitled to invoke the protections of the Fourth Amendment in a parole revocation proceeding. For the following reasons, we affirm.

The record establishes that on April 2, 1982, Keith M. Scott, Appellee, was sentenced to a ten to twenty year term of imprisonment on his plea of nolo contendere to third degree murder. With an effective date of March 31, 1983, the Department of Corrections calculated the minimum expiration date on Appellee's sentence as March 31, 1993, and the maximum term expiration as March 31, 2003.

On September 1, 1993, Appellee was released on parole subject to enumerated conditions. Condition 5(b) provides that Appellee shall refrain from "owning or possessing any firearms or other

weapons." A further provision in the "Conditions Governing Parole/Reparole" states:

> I expressly consent to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any items, in [sic] the possession of which constitutes a violation of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.

R. 5a.

Upon his release from prison, Appellee resided at the home of his mother and stepfather, Patricia and John McDaniel. On February 4, 1994, while at a local diner with Dorothy Hahn, Appellee was arrested by three parole officers pursuant to a warrant issued by the Pennsylvania Board of Probation and Parole (Board) to commit and detain him for technical parole violations. The violations involved parole condition 5(b), with respect to possession of a .22 Magnum revolver on September 4, 1993, and the possession of a 10 millimeter Glock handgun sometime in September of 1993. The violations also concerned parole condition 5(c), which prohibits Appellee from engaging in "any assaultive behavior," and parole condition 7, which states, in part, that Appellee "must not consume alcohol under any condition for any reason."[1]

Before he was transported to the Monroe County Correctional Facility by Agent Dunham, Appellee gave his keys to Agent Mundro. Dorothy Hahn then drove Appellee's vehicle to his residence and Agents Mundro and Gallo followed. When they

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[1]These violations are not at issue in the instant appeal and are mentioned merely to set forth the factual predicate of the case.

arrived, no one was home. Agent Mundro then handed Hahn the key and instructed her to unlock the door. Upon entering the residence, Hahn telephoned Mrs. McDaniel, Appellee's mother. The agents awaited her arrival and, when she returned home, informed her that they were going to conduct a search of Appellee's bedroom. They neither requested nor received consent. Upon request of the agents, Mrs. McDaniel hesitantly directed the agents to the room.

After finding no evidence of a parole violation in Appellee's bedroom, the agents searched the adjacent room, which was used as a sitting room for Mrs. McDaniel. The room contained two small sofas, an ironing board and a television. Agent Mundro found five firearms under one of the sofas. One of the guns was in a zippered shotgun case, while the other four guns were wrapped in a white cloth and secured by electrical tape. The guns were not loaded and no ammunition was found. Agent Mundro also recovered a compound bow and three arrows in a closet in the room. Mrs. McDaniel explained that the firearms belonged to her husband and that Appellee was unaware of their presence.

On March 30, 1994, a parole violation hearing was held before an administrative law judge (ALJ). The ALJ admitted the evidence resulting from the search of the residence over defense counsel's objection.[2] Appellee argued that the agents' conduct

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[2]The charge on this violation stated:
1. Violation of Condition No. 5b: YOU SHALL REFRAIN FROM OWNING OR POSSESSING ANY FIREARMS OR OTHER WEAPONS. (3 counts)

violated his right against unreasonable searches and seizures. When asked by the ALJ to explain the legal guidelines established for him to conduct the search, Agent Mundro responded:

> [A]ny individual under the supervision of the Pennsylvania Board of Probation and Parole can have his residence searched by representatives of the Board with or without the homeowner's permission if this is the parolee or probationer's approved residence. I was merely informing [Appellee's] mother that we were going to search, and I asked her to please show us where his bedroom was. We also have the right to search any common living areas in the residence.

R. 62a.

Agent Mundro was also asked whether he had been advised by someone that shotguns and rifles were in the house. He stated:

> As speaking with [Agent] Gallo prior to making the arrest of [Appellee], he [Agent Gallo] indicated that there may be firearms in the home. I don't recall that we discussed specifically what types of firearms we might find, but we definitely did discuss the fact that there may be some in the home.

R. at 69a. Agent Mundro further stated that he did not recall the source of the information regarding the existence of the firearms. Id.

Appellee testified that he did not know the guns were in the home since his mother informed him that they had been removed. Mr. McDaniel testified that the guns belonged to him. He explained that he was aware that firearms were not permitted in Appellee's approved residence, and that he therefore removed the firearms from the gun closet and secured them under the couch in anticipation of giving them to his brother.

On June 6, 1994, the Board recommitted Appellee to serve 36 months backtime. It found that sufficient evidence supported all the violations concerning the possession of weapons and the consumption of alcohol. On September 6, 1994, the Board modified its previous decision by adding two aggravating reasons for its decision: (1) that Appellee had committed multiple violations and, (2) that he is considered a threat. Appellee sought administrative relief from the Board which was denied on November 8, 1994.

Appellee then appealed to the Commonwealth Court, contending inter alia, that the ALJ admitted evidence resulting from the search of the residence in violation of his Fourth Amendment rights. The Commonwealth Court reversed and remanded. Relying primarily on Commonwealth v. Pickron, 535 Pa. 241, 634 A.2d 1093 (1993), the court concluded that a parole agent may not conduct a warrantless search of a parolee's residence in the absence of the consent of the owner or a statutory framework that satisfies the reasonableness requirement

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* * *

c. On 2-4-94, the following weapons were confiscated from your approved residence: one (1) Mossberg 12 gauge pump shotgun, serial no. G878391; one (1) Glenfield 12 gauge bolt action shotgun, serial no. 71357747; one (1) Stevens 12 gauge single shotgun, no serial number; one (1) Harrington- Richardson 12 gauge single shotgun, serial number 918060; one (1) Glenfield .22 caliber semi-automatic, Model 60, serial no. 23506068, and one (1) Green Camo-Colored Compound bow plus three arrows.

of the Fourth Amendment. It found that the consent provision in Appellee's parole agreement did "not comport with the dictates of Pickron." Commonwealth Court Opinion, 668 A.2d 590, 597 n. 3. Applying a balancing test, the court further held that the exclusionary rule was applicable to the instant parole revocation hearing because the deterrence of unlawful police conduct substantially outweighed the injury which would result from excluding the evidence obtained from Mundro's illegal search of Appellee's residence.[3] On May 15, 1996, we granted the Commonwealth's petition for allowance of appeal.

In an en banc opinion filed on July 1, 1996, the Commonwealth Court overruled its decision in this case "to the extent that it [held] that a balancing test applies and that evidence from the warrantless search should have been excluded from the parole revocation hearing." Kyte v. Pennsylvania Board of Probation and Parole, 680 A.2d 14, 18 n. 8 (Pa.Cmwlth.1996).[4] The en banc panel in Kyte found that it was well- established that the exclusionary rule was inapplicable to parole revocation hearings. It quoted extensively from our decision in Commonwealth v. Kates, 452 Pa. 102, 305 A.2d 701 (1973).

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[3]The court also reversed and remanded on the charges concerning the possession of a weapon on September 4, 1993 and the consumption of alcohol. It found that the admission of an affidavit was hearsay and constituted reversible error.

[4]Judge Kelley filed a concurring and dissenting opinion in which Judge Smith and Judge Friedman joined. Judge Kelly agreed that there was sufficient evidence to support the Board's finding of a parole violation, but disagreed as to the overruling of Scott since our Court had already granted allocatur in the matter at that time.

As noted, we granted allocatur to determine whether Appellee is entitled to the protections of the Fourth Amendment in his parole revocation hearing when he signed a consent to search provision as a condition of his parole.[5] We must first determine whether Appellee, as a parolee, has any protection under the Fourth Amendment. If we conclude that he does, we next examine the effect of his signing the consent to search provision in his "Conditions of Parole/Reparole." Finally, if we conclude that his right remains and was violated, we must determine whether, pursuant to the Fourth Amendment, the exclusionary rule applies to the administrative function of parole revocation.

Our recent decision in Commonwealth v. Williams, 547 Pa. 577, 692 A.2d 1031 (1997), resolves our first two inquiries. In Williams, the defendant was paroled from prison and, as a condition of his release, signed a consent to search provision identical to the one signed by Appellee. Williams's parole agent subsequently received information from a reliable confidential informant that Williams had resumed his drug dealing activities. This information was confirmed by the local police. The parole agents then, without a warrant or the consent of the owner of the residence, searched Williams's bedroom and discovered 182.2 grams of cocaine, a pocket scale and ammunition. The parole officer contacted the local police, who seized the evidence and obtained an arrest warrant.

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[5]The Fourth Amendment to the United States Constitution states: [T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Criminal charges were brought and Williams filed an omnibus motion to suppress the evidence seized from his bedroom on the ground that the search violated his constitutional rights. The trial court denied suppression. The Superior Court reversed and remanded, concluding that Williams's rights under the Fourth Amendment were violated.

In analyzing the suppression issue, we recognized that although parolees and probationers have a diminished expectation of privacy, "a probationer's home like anyone else's, is protected by the Fourth Amendment's requirement that searches be reasonable." Op. at ----, 692 A.2d at 1035, quoting Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S.Ct. 3164, 3168, 97 L.Ed.2d 709 (1987).[6] We explicitly held that a parolee has a privacy interest protected by the Fourth Amendment, although it is a

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[6]In Griffin, the Court held that a warrantless search of a probationer's residence was "reasonable" and did not violate the Fourth Amendment. The search was conducted pursuant to a state regulation which permitted warrantless searches of probationers if there are "reasonable grounds" to believe that contraband is present in their residence. The Court stated that the "special needs" of the state in supervising probationers justifies the departure from the usual probable cause requirements. The evidence recovered as a result of the search was therefore admitted in a subsequent criminal trial. While Griffin concerned a probationer's Fourth Amendment rights, the analysis employed equally applies to the constitutional rights of a parolee. See Gagnon v. Scarpelli, 411 U.S. 778, 782 n. 3, 93 S.Ct. 1756, 1759 n. 3, 36 L.Ed.2d 656 (1973); Cox v. Commonwealth, 507 Pa. 614, 493 A.2d 680 (1985).

more narrowly protected privacy interest than that afforded a free individual. Op. at ----, 692 A.2d at 1036.

We also relied on Commonwealth v. Pickron, 535 Pa. 241, 634 A.2d 1093 (1993), where we held that the Fourth Amendment prohibited the warrantless search of a parolee's residence based upon reasonable suspicion without the consent of the owner or without a statutory or regulatory framework governing the search.[7] Like Williams, Pickron involved the suppression of illegally obtained evidence in a criminal trial.

In deciding what effect the signing of the consent provision had on Williams's limited rights under the Fourth Amendment, we "balanc[ed] the governmental interests involved in granting parole and supervising parolees with that interest of the private individual, i.e., the parolee, which has been affected by the governmental action." Op. at ----, 692 A.2d at 1035, citing, Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

We concluded that,

> the parolee's signing of a parole agreement giving his parole officer permission to conduct a warrantless search does not mean either that the parole officer can conduct a search at any time and for any reason or that the parolee relinquishes his Fourth Amendment right to be free from unreasonable searches. Rather, the parolee's signature acts as acknowledgement that the parole officer has a right to conduct

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[7]In 1995, the General Assembly enacted a legislative framework for searches conducted by state and county parole officers. See 61 P.S. §§331.27a and 331.27b. As the search in the instant case occurred in 1994, these provisions are not applicable.

reasonable searches of his residence listed on the parole agreement without a warrant.

Op. at ----, 692 A.2d at 1036.

We went on to say that a "search will be deemed reasonable if the totality of the evidence demonstrates: (1) that the parole officer had a reasonable suspicion that the parolee had committed a parole violation, and (2) that the search was reasonably related to the parole officer's duty." Id. This "middle ground" approach requires reasonable suspicion to search a parolee's approved residence, rather than probable cause. We concluded that reasonable suspicion existed to support the search of Williams's bedroom since the information upon which it was based was given by a reliable confidential informant and was confirmed by the local police. Accordingly, we found that the evidence was admissible in the criminal proceeding.

Applying Williams to the instant case, we hold that Appellee has a Fourth Amendment right against unreasonable searches and seizures that is unaffected by his signing of the consent to search provision. We further find that this right was clearly violated since the search was conducted without reasonable suspicion. Agent Mundro testified that he spoke with Agent Gallo prior to the search and they concluded that there may be firearms in the home. Agent Mundro did not recall the source of the information regarding the existence of the weapons. Thus, the agents' suspicion was based on mere speculation and was insufficient to support a warrantless search of the room adjacent to Appellee's bedroom.

It does not necessarily follow, however, that exclusion of the evidence in the parole revocation proceeding is required. We recognize that the Fourth Amendment "has never been interpreted to proscribe the introduction of illegally seized

evidence in all proceedings or against all persons." United States v. Leon, 468 U.S. 897, 906, 104 S.Ct. 3405, 3411, 82 L.Ed.2d 677, citing Stone v. Powell, 428 U.S. 465, 486, 96 S.Ct. 3037, 3048, 49 L.Ed.2d 1067 (1976). The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands. Id. at 906, 104 S.Ct. at 3411. The remedy available in Williams, Pickron and Griffin, i.e., the application of the exclusionary rule, does not automatically apply to Appellee as parole revocation is an administrative proceeding.

In determining whether the exclusionary rule should be extended, we must balance the potential benefits of excluding the evidence against the potential injury to the historic role and function of the proceedings in which the illegally obtained evidence is to be admitted. If the potential harm substantially outweighs potential benefits, then the rule should not be extended. United States v. Calandra, 414 U.S. 338, 349, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974).

The Board, as Appellant, contends that this issue is controlled by our decision in Commonwealth v. Kates, which involved three consolidated probation violation cases. One probationer challenged the admissibility of a statement obtained absent Miranda warnings in violation of the Fifth Amendment. Another contended that he was precluded from confronting his accuser in contravention of the Sixth Amendment. The third probationer argued that it was improper to conduct a revocation proceeding prior to a criminal trial based upon the same conduct.

Balancing the good to be obtained from the expansion of the exclusionary rule against the harm which would result due to the unique nature and purpose of the probation revocation hearing, we concluded that the illegally obtained evidence was admissible in the probation violation hearing. Kates, 452 Pa. at 120, 305

A.2d at 710. Citing the United States Court of Appeals for the Second Circuit in Sperling v. Fitzpatrick, 426 F.2d 1161, 1163-1164 (2nd Cir.1970), we stated that

> ... A Parole [sic] revocation proceeding is concerned not only with protecting society, but also, and most importantly with rehabilitating and restoring to useful lives those placed in the custody of the Parole Board. To apply the exclusionary rule to parole revocation proceedings would tend to obstruct the parole system in accomplishing its remedial purposes.
>
> There is no need for double application of the exclusionary rule, using it first as it was used here in preventing criminal prosecution of the parolee and a second time at a parole revocation hearing. The deterrent purpose of the exclusionary rule is adequately served by the exclusion of the unlawfully seized evidence in the criminal prosecution.

Id. at 119, 305 A.2d at 710 (footnote omitted).

The decisions in Kates and Sperling focus on the sole purpose of the exclusionary rule under the United States Constitution which is to deter unlawful police conduct. United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). The rationale is that applying the exclusionary rule to probation revocation hearings would at most marginally deter police misconduct and would frustrate the remedial purposes of the probation system.

A majority of the United States Courts of Appeals that have addressed the issue have agreed with this proposition and have found that the exclusionary rule is generally inapplicable to parole revocation hearings. See United States v. Finney, 897 F.2d 1047 (10th Cir.1990); United States v. Bazzano, 712 F.2d 826 (3rd Cir.1983), cert denied, 465 U.S. 1078, 104 S.Ct. 1439, 79 L.Ed.2d 760 (1984); United States v. Frederickson, 581 F.2d 711 (8th Cir.1978); United States v. Farmer, 512 F.2d 160 (6th

Cir.1975); United States v. Brown, 488 F.2d 94 (5th Cir.1973); United States v. Hill, 447 F.2d 8[illegible]7 (7th Cir.1971). Only the United States Court of Appeals f[illegible] the Fourth Circuit has held that the exclusionary rule is generally applicable to parole revocation hearings. United States v. Workman, 585 F.2d 1205 (4th Cir.1978).[8]

Our research indicates, however, that two circuit courts of appeals, while adhering to the general rule that the exclusionary rule is inapplicable in parole revocation hearings, have adopted a limited application of the rule in instances where the law enforcement officers knew or had reason to know that the suspect was on probation. In United States v. Winsett, 518 F.2d 51, (9th Cir.1975), the Court of Appeals for the Ninth Circuit found that the interest in deterring police misconduct outweighs the interest in implementing the probation system when the officer is aware of the suspect's probationary status. The court reasoned,

> [W]hen the police at the moment of search know that a suspect is a probationer, they may have a significant incentive to carry out an illegal search even though knowing that evidence would be inadmissible in any criminal proceeding. The police have nothing to risk: If the motion to suppress in the criminal proceedings were denied, defendant would stand convicted of a new crime; and if the motion were granted, the defendant would still find himself behind bars due to revocation of probation. Thus, in such circumstances, extension of the exclusionary rule to the probation revocation proceeding may be necessary to effectuate Fourth Amendment safeguards.

Id. at 54 n. 5.

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[8]To date, the United States Supreme Court has not spoken on this issue.

While reaffirming its decision in Sperling, upon which we relied in Kates, the Second Circuit Court of Appeals has accepted this view as well. United States v. Rea, 678 F.2d 382 (2nd Cir.1982). The court noted that the police officer in Sperling was unaware of the probationer's status and held that evidence seized by a probation officer in an illegal warrantless search of a probationer's home is inadmissible at a subsequent probation revocation hearing. The court stated:

> [A] probation officer who seeks to discover and seize evidence for use in a probation revocation hearing is very likely to be deterred from proceeding without a warrant if the officer knows that evidence so seized is apt to be excluded from the very proceeding with which he is concerned.

Id. at 390.

We are persuaded by this approach which considers the knowledge of the officer engaging in the misconduct.[9] While the harm to the parole revocation proceeding from application of the exclusionary rule remains the same whether or not the officer is

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[9]We note that some of the federal courts which have precluded the use of the exclusionary rule in probation revocation proceedings have not been faced with the factual scenario where the officer who conducted the search knew or had reason to know that the suspect was a parolee or probationer. The court in Finney noted that it need not determine this specific issue since the facts did not support the officer's knowledge in that regard. 897 F.2d at 1048. The Bazzano court expressly left open the question whether the exclusionary rule should be applied in a probation revocation proceeding if the police knew or had reason to know that the target of their search was a probationer. 712 F.2d at 833 n. 1. (Garth, J., dissenting). Finally, in Hill, the court recognized the fact that the suspect was not known to the officers to be a probationer or parolee. 477 F.2d at 819 (Fairchild, J., dissenting).

aware of the parolee's status, the benefits obtained from expanding the rule are quite different.

Our focus is on the likelihood of deterring official misconduct. To illustrate the point, we first examine the instance when a police officer is unaware of the parolee's status. In that situation, the officer sees the parolee as any other citizen with full constitutional protection. The officer has no incentive to illegally obtain evidence as he is cognizant that such evidence will most likely be subject to suppression. Thus, the deterrent purpose of the exclusionary rule is adequately served by the application of the rule in the criminal trial. There is no reason to apply the rule in a parole revocation hearing because it is unlikely to act as an additional deterrent to illegal police behavior. In other words, because the police officer has no knowledge of a possible parole revocation hearing, the application of the exclusionary rule in that proceeding would not act to deter police misconduct in obtaining evidence to present there. When balancing the relevant interests, the scale tips in favor of the efficient operation of the revocation proceeding.

A different balance exists, however, when the officer knows or has reason to know that the suspect is a parolee or probationer. When the suspect's parole/probation officer or a police officer aware of the parolee's status engages in the misconduct, the balance is different. Under these circumstances, when there is no reasonable suspicion of a parole violation, there is a need to apply the exclusionary rule to the revocation process since otherwise there is nothing to deter a parole agent from conducting an illegal search or engaging in other illegal activity to obtain evidence. The parole agent could establish a parole violation by means of illegally obtained evidence in a proceeding which places a minimal burden of proof upon the

Commonwealth,[10] and the same result would be achieved as if the parolee was criminally tried--the parolee would be incarcerated. In this limited instance, the deterrent effect to be gained through application of the exclusionary rule in parole revocation hearings substantially outweighs the potential injury to the functioning of the revocation proceedings.

In the Fourth Amendment context, when an officer is aware or has reason to be aware of a suspect's parole or probationary status, he must have reasonable suspicion of a parole violation in order to conduct a search. If reasonable suspicion does not exist, the exclusionary rule will apply in the parole revocation hearing.[11] This holding modifies our per se bar against the application of the exclusionary rule in parole revocation hearings set forth in Kates and applies the exclusionary rule in revocation

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[10]Our courts have consistently held that in parole and probation revocation proceedings the Commonwealth's burden is to prove a violation by a preponderance of the evidence. *Commonwealth v. Wright*, 508 Pa. 25, 494 A.2d 354 (1985).

[11]We note that the recently enacted statute provides that "[a] property search may be conducted by any [parole] agent if there is reasonable suspicion to believe that the real or other property in the possession of or under the control of the offender contains contraband or other evidence of violations of the conditions of supervision." 61 P.S. § 331.27a.(d)(2). The statute also provides that although no violation of the section can establish an independent ground for suppression of evidence in any probation/parole or criminal proceeding, the section should not be construed to permit searches in violation of the United States Constitution or Article I, Section 8 of the Pennsylvania Constitution. See 61 P.S. § 331.27a.(b)-(c).

hearings when the officer who engaged in the misconduct is aware of the parolee's status.[12]

Applying the rule to the instant case, we find that it is clear that Agents Mundro and Gallo knew Appellee was a parolee. This is established by the fact that immediately prior to the search, the agents arrested Appellee for parole violations. The exclusionary rule should therefore apply to Appellee's parole revocation hearing and the evidence obtained from the illegal search of his residence should be suppressed.[13] Accordingly, for the reasons

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[12]The outcome in Kates, however, would remain unchanged since there is no evidence that the police officers involved were aware of the probationary status of the suspects.

[13]Our decision is premised solely upon federal constitutional grounds. The history of our counterpart to the Fourth Amendment, Article I, Section 8 of the Pennsylvania Constitution, indicates that the purpose underlying the exclusionary rule in this Commonwealth is two- fold. We have held that "the exclusionary rule in Pennsylvania has consistently served to bolster the twin aims of Article I, Section 8; to-wit, the safeguarding of privacy and the fundamental requirement that warrants shall only be issued upon probable cause." Commonwealth v. Edmunds, 526 Pa. 374, 398, 586 A.2d 887, 889 (1991). Appellee, however, has not raised a claim under the Pennsylvania Constitution and therefore we leave for another day the question of the applicability of the exclusionary rule in an Article I, Section 8 challenge in a parole revocation proceeding. The statement in Commonwealth v. Williams that our state constitution does not grant greater rights with regards to warrantless searches by parole agents, Op. at ----, 692 A.2d at 1039, must be read in the context of that case, which involved a

set forth herein, the order of the Commonwealth Court is affirmed.

NEWMAN, J., did not participate in the consideration or decision of this case.

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criminal prosecution and not a parole revocation.

Keith M. SCOTT, Petitioner,
v.
PENNSYLVANIA BOARD OF PROBATION AND PAROLE, Respondent.

Commonwealth Court of Pennsylvania.

Submitted on Briefs April 28, 1995.

Decided Nov. 30, 1995.

Before DOYLE and KELLEY, JJ., and NARICK, Senior Judge.

KELLEY, Judge.

Keith M. Scott appeals from an administrative order of the Pennsylvania Board of Probation and Parole denying his request for administrative relief from the board's revocation decision recommitting him as a technical parole violator. We reverse and remand..

On April 2, 1992, Scott was sentenced to a 10-to-20 year term of imprisonment on his nolo contendere plea to the crime of third degree murder. With an effective date of March 31, 1983, the Department of Corrections calculated the minimum expiration date on Scott's sentence as March 31, 1993, and the maximum term expiration date as March 31, 2003. On September 1, 1993, Scott was released on parole subject to a number of conditions.

On February 4, 1994, the board issued a warrant to commit and detain Scott, and a notice of charges and hearing based on his alleged technical violation of parole conditions 5b, 5c and 7. The notice alleged the following charges:

1. Violation of Condition No. 5b: YOU SHALL REFRAIN FROM OWNING OR POSSESSING ANY FIREARMS OR OTHER WEAPONS. (3 counts)
a. On 9-4-93, you were in possession of a 22 Magnum revolver pistol.
b. During September of 1993, you were in possession of a 10 millimeter Glock handgun.
c. On 2-4-94, the following weapons were confiscated from your approved residence: one (1) Mossberg 12 gauge pump shotgun, serial no. G878391; one (1) Glenfield 12 gauge bolt action shotgun, serial no. 71357747; one (1) Stevens 12 gauge single shotgun, no serial number; one (1) Harrington- Richardson 12 gauge single shotgun, serial no. 918060; one (1) Glenfield .22 caliber semi-automatic, Model 60, serial no. 23506068, and one (1) Green Camo- Colored Compound bow plus three arrows.
2. Violation of Condition No. 5c: YOU SHALL REFRAIN FROM ANY ASSAULTIVE BEHAVIOR.
During November of 1993, you threatened a co-worker, Gerald Thomas, by approaching Mr. Thomas and stating "I am going to fuckin kill you" numerous times.
3. Violation of Condition No. 7, Special Condition: YOU MUST NOT CONSUME ALCOHOL UNDER ANY CONDITION OR FOR ANY REASON. (2 counts)
a. On or about 9-2-93, you consumed Zima Clear Malt alcoholic beverages.
b. On or about 1-18-94, you consumed Southern Comfort alcoholic beverages.
(Certified Record (R.), pp. 10-11). On March 23, 1994, another notice of charges and hearing alleging the same technical parole violations was issued by the board. (R., pp. 24-25).

On March 30, 1994, a hearing was held on the alleged violations before John Engle, a hearing examiner. In support of Counts 1(a) and 3(a), the board called Eric Hahn as a witness. Because

Hahn was reluctant to testify at the hearing, the board introduced an affidavit signed by him to establish the alleged violations. Scott then made a statement, admitting the allegation contained in Count 1(a). Scott also introduced an affidavit executed by Hahn which indicated that his prior affidavit was executed under pressure by parole agents.

In support of Counts 1(b), 2 and 3(b), the board called Ray Opperlee. Opperlee testified and was cross-examined regarding these alleged violations of Scott's parole conditions. Scott denied the allegation in Count 3(b), stating that the only alcohol he had consumed while on parole was contained in prescription cough syrup. Scott did not comment on the other two counts.

In support of Count 1(c), the board called Larry Mundro, a parole supervisor. Mundro testified regarding a search that had been conducted on Scott's approved residence, his parents' house. Mundro found a number of weapons in the house. Scott argued that the search was executed in violation of his rights against unreasonable searches and seizures, and sought the exclusion of this evidence on these grounds. The hearing officer permitted Mundro to testify over Scott's objection.

In response, Scott stated that the weapons recovered from his parents' house were owned by his stepfather. Scott stated that, before his release, he had instructed his mother and stepfather that they must get rid of all of the guns in the house in order for him to stay there. Scott stated further that his mother had told him that she had taken all of his stepfather's guns from the house, and that he had no idea that the weapons were still there. In addition, the room in which the weapons were found was his mother's private sitting area. When he would come home at night, Scott stated, he would see his mother in there watching television.

At the hearing Scott's stepfather, John McDaniel, stated that the weapons recovered from the house were owned by him. Mr. McDaniel testified that after he was told that he would have to dispose of the weapons, he wrapped them up to give them to his brother. In addition, Mr. McDaniel indicated that the room in which the weapons were found was used exclusively by his wife to watch television.

Finally, in support of Count 3(a), the board called Parole Agent Loren Dunham to testify. Dunham stated that after he had arrested Scott on the parole violation charges, Scott admitted that he had consumed alcohol while on parole. Again, in defense of the charges, Scott stated that the only alcohol he had consumed while on parole, or that he admitted to consuming while on parole, was contained in prescription cough syrup.

On June 16, 1994, the board mailed Scott its decision regarding his parole violations. The board found that evidence had been presented to support the charges in Counts 1(a), 1(b), 1(c) and 3(a). In rendering this decision, the board relied on the following evidence: Scott's admissions regarding Counts 1(a) and (c); the testimony of Opperlee regarding Counts 1(b) and 2; the testimony of Mundro regarding Count 1(c); and the affidavit of Hahn regarding Counts 1(a) and 3(a). As a result, the board recommitted Scott to serve the remainder of his sentence and 36 months backtime. On September 6, 1994, the board modified its previous decision by adding two aggravating reasons for its decision; namely, that Scott had committed multiple violations and that he is considered a threat. Scott sought administrative relief from the board which was denied in a decision mailed on November 9, 1994. This appeal followed.

On appeal, Scott claims:[1] (1) the hearing examiner erred in allowing the introduction of evidence obtained in violation of his Fourth Amendment rights to support Count 1(c); (2) the hearing examiner erred in allowing the introduction of hearsay evidence to support Count 3(a) without a specific finding of good cause; (3) the violations found at Counts 1(c) and 3(a) are not supported by substantial evidence; (4) his recommitment to 36 months of backtime is not supported by substantial competent evidence and was done without adequate written justification; and (5) the notice of the hearing and charges for his preliminary and revocation hearings were improperly vague.

This court's scope of review of an adjudication by the board is limited to a determination of whether or not it is supported by substantial evidence, is in accordance with the law, and is observant of the petitioner's constitutional rights. Johnson v. Pennsylvania Board of Probation and Parole, 129 Pa.Cmwlth. 652, 566 A.2d 918 (1989), aff'd, 525 Pa. 573, 583 A.2d 790 (1991).

On appeal, Scott first claims that the warrantless non-consensual search of his parents' home violated his Fourth Amendment rights against unreasonable searches and seizures. At the parole revocation hearing, the board called Mundro as a witness to support the charges alleged at Count 1(c). (R., pp. 73- 86). Mundro was present when Scott was arrested for the alleged violations while he was at a diner with a companion. (R., pp. 76, 80). Prior to his arrest, Mundro was told that there might be firearms present in Scott's approved residence. (R., p. 85). As a result, after securing a key from Scott, Mundro and other

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[1]In the interest of clarity, we consolidate and reorder Scott's claims on appeal.

parole agents accompanied Scott's companion to his approved residence to search for firearms. (R., pp. 75-76, 78, 80).

Upon arriving at Scott's approved residence, Mundro gave Scott's companion the key and she unlocked the kitchen door. (R., p. 76). As soon as they entered the home, Scott's companion called his mother, Mrs. McDaniel, the owner of the home. Id. Mundro instructed all of the agents to remain in the kitchen while awaiting Mrs. McDaniel's arrival. Id. When she arrived, Mundro told Mrs. McDaniel that he was going to conduct a search of her son's bedroom and asked her to direct him to that room. (R., pp. 76-77). When Mrs. McDaniel hesitated to disclose this information, Mundro told her that he and the agents would go upstairs and locate and search his room themselves. (R., p. 77). Mrs. McDaniel acquiesced and escorted Mundro and the agents upstairs and pointed out her son's bedroom. Id.

After Mrs. McDaniel had gone back downstairs to the kitchen, Mundro searched a room adjacent to Scott's bedroom. (R., pp. 80, 81). The room contained two small sofas with an ironing board in between them, and a television set at the far end. (R., p. 80). Mundro found five firearms under one of the sofas in the room. (R., p. 81). One of the guns recovered was in a zippered shotgun case; the other four were wrapped in a white cloth with electrical tape securing the cloth. (R., pp. 81, 84). None of the guns were loaded, and Mundro did not find any ammunition. (R., pp. 83, 84). Mundro also found a compound bow and three arrows in a closet in the room. (R., pp. 81-82).

After uncovering the weapons, Mundro interviewed Mrs. McDaniel regarding their ownership. (R., pp. 82-83). He advised Mrs. McDaniel that he was confiscating the weapons because they were discovered in her son's approved residence and, in his opinion, they were accessible to Scott. (R., p. 83).

Mrs. McDaniel indicated that none of the guns belonged to her son and that they all belonged to her husband. Id.

Scott's counsel attempted to exclude Mundro's testimony, arguing that his search of the home was illegal as it was conducted without the consent of the homeowner. (R., pp. 73-74, 75, 77, 79). When asked by the hearing examiner to explain his legal responsibilities and the legal guidelines he follows in conducting a search, Mundro stated:

> [A]ny individual under the supervision of the Pennsylvania Board of Probation and Parole can have his residence searched by representatives of the Board with or without the homeowner's permission if this is the parolee or probationer's approved residence. I was merely informing Mr. Scott's mother that we were going to search, and I asked her to please show us where his bedroom was. We also have the right to search any common living areas in the residence.

(R., p. 78).

In allowing the admission of the testimony, the hearing examiner stated:

> [T]he issue is on the record. My finding regarding this issue is that there were--that the consent--that the search (INAUDIBLE) was a bit unusual but within requirements so established for consent by residences of parolees by parole agents and the Commonwealth. So let's go forward having resolved the issue of the search.

(R., pp. 79-80).

The Fourth Amendment to the United States Constitution states, in pertinent part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searched and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause...." U.S. Const. amend. IV.

It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). The physical entry into the home is the chief evil against which the wording of the Fourth Amendment is directed. Id.

Although a search must usually be undertaken only pursuant to a warrant based upon probable cause, the United States Supreme Court has permitted exceptions when "special needs" beyond the normal need for law enforcement make the warrant and probable cause requirements impracticable. Griffin v. Wisconsin, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). In Griffin, a probationer's house was searched by probation officers acting without a warrant, on information from a police tip. The search was conducted under state regulations which allowed any probation officer to search a probationer's home without a warrant as long as his supervisor approved, and there were "reasonable grounds" to believe that contraband was present. The officers found a handgun which later served as the basis for a prosecution for a weapons offense. The probationer sought suppression of the handgun, alleging that it was obtained in violation of his Fourth Amendment rights. His suppression motion was denied and he was convicted of the weapons charge. His conviction was subsequently affirmed by the state appellate courts. Griffin, 483 U.S. at 870-72, 107 S.Ct. at 3167-68.

The United States Supreme Court granted certiorari to consider whether the search violated the probationer's Fourth Amendment rights. Id. at 870, 107 S.Ct. at 3166. The Court noted that a probationer does not enjoy the absolute liberty to which every citizen is entitled, but only a conditional liberty dependent upon the observance of probation restrictions. Id. at 874, 107 S.Ct. at 3169. However, a probationer's home, like anyone else's, is

protected by the Fourth Amendment's requirement that searches be "reasonable". Id. at 873, 107 S.Ct. at 3168.

The Court reasoned that a state's operation of a probation system, like its operation of a school, government office or prison, presents "special needs" beyond normal law enforcement which justifies departure from the usual warrant and probable cause requirements of the Fourth Amendment. Id. at 873-74, 107 S.Ct. at 3168. The "special needs" of the probation system made the warrant requirement impracticable, and justified the replacement of the probable cause standard with the "reasonable grounds" standard as contained in the state regulations. Id. at 875-76, 107 S.Ct. at 3169-70. Thus, the search of the probationer's home in Griffin satisfied the Fourth Amendment because it was carried out under a regulation which itself satisfied the Fourth Amendment's "reasonableness" requirement. Id. at 873, 107 S.Ct. at 3168.

In Commonwealth v. Pickron, 535 Pa. 241, 634 A.2d 1093 (1993), the Pennsylvania Supreme Court acknowledged that parolees have limited Fourth and Fifth Amendment rights in parole revocation hearings.[2] In Pickron, parole agents went to the parolee's residence with a warrant for her arrest based on her failure to report. When they arrived, the agents advised her mother that they intended to search the house for her daughter, and they were admitted for that limited purpose. While searching a small office in the apartment, an agent found a bottle

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[2]Despite the minor differences between probation and parole, the revocation of probation where sentence has been previously imposed is constitutionally indistinguishable from the revocation of parole. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

of quinine, a cutting agent for heroin. An expanded search of the office, the parolee's bedroom and the kitchen yielded three packets containing a white substance, a packet containing a green weed, a plastic bottle containing another cutting agent, and a number of items used to package contraband. The parolee was arrested on her arrival at the apartment. Criminal charges were filed against her based on the items recovered in the search. Prior to trial, the parolee sought suppression of the items recovered from the apartment. The trial court granted the suppression motion; however, the Superior Court reversed the order granting suppression. Pickron, 535 Pa. at 243-44, 634 A.2d at 1094-95.

The Pennsylvania Supreme Court granted allocatur to examine the Fourth Amendment rights of a parolee. Id. at 245, 634 A.2d at 1095. Relying on Griffin, the court reversed the Superior Court order and reinstated the trial court order suppressing the items seized in the search. Id. at 247- 48, 634 A.2d at 1096-98. Our Supreme Court stated:

> In the instant case[,] we do not have before us a statutory or regulatory framework nor an agreement by the [parolee] consenting to the search. Thus, we are confronted with the issue left unaddressed by Griffin. We hold therefore that the fourth amendment prohibits the warrantless search of probationers or parolees' residences based upon reasonable suspicion without the consent of the owner or without a statutory or regulatory framework governing the search. We do so because we recognize that there are no safeguards to protect the limited fourth amendments rights of probationers and parolees if their supervision is left entirely to the discretion of individual parole officers. In the traditional fourth amendment case, the warrant requirement based upon probable cause and issued by a neutral and detached magistrate guarantees the protection of a citizen's constitutional rights.

> Similarly, in the context of a probationer or parolee's limited fourth amendment rights, some systemic procedural safeguards must be in place to guarantee those limited fourth amendment rights. In the absence of any statutory or regulatory framework, or an agreement explicitly setting out the rights of the [parolee] and the authority of the state to supervise the [parolee], we are constrained to conclude that the actions of these parole officers violated the fourth amendment.

Id. at 249-50, 634 A.2d at 1098 (footnote omitted).

Thus, under Pickron, a parole agent may not conduct a warrantless search of a parolee's residence in the absence of (1) the consent of the owner; or (2) a statutory or regulatory framework which satisfies the "reasonableness" requirement of the Fourth Amendment. Commonwealth v. Richardson, --- Pa.Superior Ct. ----, 664 A.2d 1042 (1995); Commonwealth v. Walter, 440 Pa.Superior Ct. 263, 655 A.2d 554 (1995); Commonwealth v. Alexander, 436 Pa.Superior Ct. 335, 647 A.2d 935 (1994).

In the instant case, it is clear that Mundro did not obtain the owner's valid consent to conduct a search of Scott's approved residence. In order for consent to an otherwise illegal search to be valid, the consent must be unequivocal, specific and voluntary. Commonwealth v. Gibson, 536 Pa. 123, 638 A.2d 203 (1994). To be effective, a consent to search must be voluntarily given with a total absence of duress or coercion, express or implied. Commonwealth v. Lowery, 305 Pa.Superior Ct. 66, 451 A.2d 245 (1982). It is only where there is an intentional relinquishment or abandonment of a known right or privilege that an effective waiver can be found. Gibson. The subject of a search must be made aware of her rights against a warrantless search for a waiver to be intelligent. Id.

Mundro gained entrance to Scott's approved residence by using a key recovered from him when he was arrested. (R., pp. 75-76). Once Mundro and the other agents were inside the kitchen, Mrs. McDaniel was contacted. (R., p. 76). When Mrs. McDaniel arrived, Mundro told her that he was going to search her son's bedroom and asked her to direct him to that room. (R., pp. 76-77). When she hesitated to disclose this information, Mundro told her that he and the other agents would go upstairs and locate and search the room themselves. (R., p. 77). Mrs. McDaniel acquiesced and directed Mundro to her son's bedroom; however, after she had gone back downstairs to the kitchen, Mundro found the weapons in his search of a room adjacent to her son's bedroom. (R., pp. 77, 80, 81). Under these circumstances, it is clear that Mrs. McDaniel did not voluntarily, intelligently and unequivocally consent to the search conducted by Mundro. Gibson; Lowery.

In addition, when asked by the hearing examiner the guidelines under which he may conduct a search, Mundro stated that "[a]ny individual under the supervision of the Pennsylvania Board of Probation and Parole can have his residence searched by representatives of the Board with or without the homeowner's permission...." (R., p. 78). Apparently, Mundro perceived that he had boundless authority to conduct a search of the residence. However, Mundro did not cite any statutory or regulatory framework granting him the authority to conduct such a search. Id.[3]

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[3]It should be noted that at the time he was paroled, Scott signed a Pennsylvania Board of Probation and Parole form PBPP-11 (Rev. 7/91) which is entitled "Conditions of Parole/Reparole" and states, in pertinent part:

> I expressly consent to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any items, in the possession of which constitutes a violation of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.

However, this consent paragraph does not comport with the dictates of Pickron. Richardson; Walter.

The "statutory or regulatory framework" referred to in Pickron requires the passage of a statute or regulation through the appropriate legislative process complete with publication in either the Pennsylvania Statutes or the Pennsylvania Bulletin. Richardson; Alexander. Our research has uncovered no enacted statute or regulation which would grant Mundro the authority to conduct such a search. Because Mundro's warrantless search of Scott's approved residence was conducted without the owner's consent and without a statutory or regulatory framework authorizing such a search, we must conclude that the search was conducted in violation of Scott's limited Fourth Amendment rights. Pickron; Richardson; Walter; Alexander.

Finding that the search violated Scott's Fourth Amendment rights, we must now address whether the evidence obtained in the search should have been excluded from the revocation hearing. The Fourth Amendment contains no provision precluding the use of evidence obtained in violation of its commands. United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). Rather, the exclusionary rule was adopted by the United States Supreme Court to effectuate the Fourth Amendment rights of citizens against unreasonable searches and seizures. Illinois v. Krull, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987); Calandra.

The purpose of the rule is not to redress the injury to the privacy of the victim of the search; its prime purpose is to deter future unlawful police conduct thereby effectuating the Fourth Amendment guarantees against unreasonable searches and seizures. Krull; Calandra. Thus, the rule operates as a judicially created remedy designed to generally safeguard Fourth Amendment rights through its deterrent effect, rather than to vindicate the personal constitutional rights of the aggrieved party. Krull; Leon; Calandra.

Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to preclude the use of illegally obtained evidence in all proceedings or against all persons. Id. The issue of whether the exclusionary rule should be applied in a particular case is separate from the question of whether the Fourth Amendment rights of the aggrieved party were violated by police conduct. Leon. The application of the rule has been limited to those areas where its remedial objectives are thought to be most efficaciously served. Krull; Calandra. Therefore, in order to extend the rule beyond its traditional application in criminal prosecutions, the court must weigh the rule's potential for deterring unlawful actions against the damage of withholding reliable information from the truth-seeking process. Krull; Leon; Calandra. See also Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); United States v. Janis, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976); Calandra.

To date, the United States Supreme Court has not addressed the issue of whether the exclusionary rule is applicable to parole revocation proceedings. However, the Court has used the balancing of interests framework first enunciated in Calandra to determine whether the rule should be applied beyond its traditional application. See, e.g., INS v. Lopez-Mendoza, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984) (deportation

proceedings); Janis (a taxpayer refund suit); Calandra (grand jury proceedings). Therefore, we must apply the Calandra analytical framework to determine whether it is appropriate to extend the application of the exclusionary rule to parole revocation proceedings.

In general, the essence of parole is release from prison before the completion of the sentence, on the condition that the parolee abide by certain rules during the balance of the sentence. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Its purpose is to help individuals reintegrate into society as constructive individuals. Gagnon; Morrissey. Thus, it is primarily concerned with the rehabilitation and restoration of the parolee to a useful life. Commonwealth v. Marchesano, 519 Pa. 1, 544 A.2d 1333 (1988); Commonwealth v. Quinlan, 488 Pa. 255, 412 A.2d 494 (1980); Commonwealth v. Kates, 452 Pa. 102, 305 A.2d 701 (1973). It is a discretionary penological measure to which a parolee has no absolute right. Marchesano; Kates.

The granting and rescinding of parole are purely administrative functions. Rivenbark v. Pennsylvania Board of Probation and Parole, 509 Pa. 248, 501 A.2d 1110 (1985). Because the revocation of parole is not part of a criminal prosecution, the full panoply of rights due to a criminal defendant does not apply to parole revocations. Morrissey. The state has an overwhelming interest in being able to return a parolee to imprisonment without the burden of a new adversary criminal trial if, in fact, the parolee has failed to abide by the conditions of his parole. Id. Thus, the hearing determining the revocation of parole should be flexible enough to consider evidence and materials that would not be admissible in an adversary criminal trial. Id.; Kates. The controlling consideration at a revocation hearing is whether the facts presented are probative and reliable, and not whether

traditional rules of procedure have been strictly observed. Marchesano; Quinlan; Kates. As a result, the courts in Pennsylvania have generally declined to extend the exclusionary rule to parole revocation proceedings. Id.; Knuckles v. Pennsylvania Board of Probation and Parole, 111 Pa.Cmwlth. 487, 533 A.2d 1156 (1987); Nickens v. Pennsylvania Board of Probation and Parole, 93 Pa.Cmwlth. 313, 502 A.2d 277 (1985).

Pennsylvania is not alone in this regard. The majority of the federal courts that have addressed the application of the exclusionary rule to parole or probation revocation hearings have also concluded that, as a general rule, the rule is not applicable to these proceedings. See, e.g., United States v. Finney, 897 F.2d 1047 (10th Cir.1990); United States v. Bazzano, 712 F.2d 826 (3rd Cir.1983); United States v. Frederickson, 581 F.2d 711 (8th Cir.1978); United States v. Vandemark, 522 F.2d 1019 (9th Cir.1975); United States v. Winsett, 518 F.2d 51 (9th Cir.1975); United States v. Farmer, 512 F.2d 160 (6th Cir.1975); United States v. Brown, 488 F.2d 94 (5th Cir.1973); United States v. Hill, 447 F.2d 817 (7th Cir.1971); United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161 (2nd Cir.1970).

Only the United States Court of Appeals for the Fourth Circuit has held that the exclusionary rule is generally applicable to revocation hearings. United States v. Workman, 585 F.2d 1205 (4th Cir.1978). See also United States v. Rea, 678 F.2d 382 (2nd Cir.1982) (Evidence seized by a probation officer in a warrantless search of a probationer's home is inadmissible at a subsequent probation revocation hearing as the deterrent effect of the exclusionary rule substantially outweighs the injury to the function of the proceedings).

In addition, a number of state courts have also declined to apply the exclusionary rule to revocation proceedings as a general rule.

See, e.g., Ex parte Caffie, 516 So.2d 831 (Ala.1987); State v. Sears, 553 P.2d 907 (Alaska 1976); State v. Shirley, 117 Ariz. 105, 570 P.2d 1278 (1977); Harris v. State, 270 Ark. 634, 606 S.W.2d 93 (App.1980); In re Tyrell J., 8 Cal.4th 68, 876 P.2d 519, 32 Cal.Rptr.2d 33 (1994); People v. Ressin, 620 P.2d 717 (Colo.1980); Payne v. Robinson, 207 Conn. 565, 541 A.2d 504 (1988); Thompson v. United States, 444 A.2d 972 (D.C.1982); People v. Watson, 69 Ill.App.3d 497, 26 Ill.Dec. 19, 387 N.E.2d 849 (1979); Dulin v. State, 169 Ind.App. 211, 346 N.E.2d 746 (1976); Kain v. State, 378 N.W.2d 900 (Iowa 1985); State v. Turner, 19 Kan.App.2d 535, 873 P.2d 208 (1994); State v. Davis, 375 So.2d 69 (La.1979); State v. Caron, 334 A.2d 495 (Me.1975); Chase v. State, 309 Md. 224, 522 A.2d 1348 (1987); Commonwealth v. Olsen, 405 Mass. 491, 541 N.E.2d 1003 (1989); People v. Perry, 201 Mich.App. 347, 505 N.W.2d 909 (1993); State v. Thorsness, 165 Mont. 321, 528 P.2d 692 (1974); State v. Field, 132 N.H. 760, 571 A.2d 1276 (1990); People v. Jackson, 46 N.Y.2d 171, 412 N.Y.S.2d 884, 385 N.E.2d 621 (1978); State v. Lombardo, 306 N.C. 594, 295 S.E.2d 399 (1982); Richardson v. State, 841 P.2d 603 (Okla.Crim.1992); State v. Spratt, 120 R.I. 192, 386 A.2d 1094 (1978); Hughes v. Gwinn, 170 W.Va. 87, 290 S.E.2d 5 (1982); Gronski v. State, 700 P.2d 777 (Wyo.1985).

Only a handful of state courts have found that, under their state constitutions, the exclusionary rule is generally applicable to revocation proceedings. See, e.g., State v. Cross, 487 So.2d 1056 (Fla.1986); State ex rel. Juvenile Department of Multnomah County v. Rogers, 314 Or. 114, 836 P.2d 127 (1992); Mason v. State, 838 S.W.2d 657 (Tex.App.1992); State v. Lampman, 45 Wash.App. 228, 724 P.2d 1092 (1986).

However, some of the federal courts that have declined to generally apply the exclusionary rule to revocation proceedings

obtained from Mundro's illegal search of Scott's approved residence. At the time Mundro went to the house, Scott had already been arrested for alleged parole violations. Mundro's sole purpose for conducting the search was to uncover evidence of additional violations. To recover this evidence, Mundro gained entrance to the house without Mrs. McDaniel's knowledge or consent. Once Mrs. McDaniel had arrived, she reluctantly directed Mundro and the other agents upstairs to Scott's bedroom. After she had gone back downstairs, Mundro expanded his search to another room adjacent to Scott's bedroom.

Under these circumstances, the application of the exclusionary rule is necessary and proper to proscribe a search such as the one conducted by Mundro in this case. In a case such as this, the need to exclude the improperly obtained evidence outweighs the injury to the parole revocation process which would be caused by the exclusion. See, e.g., Workman; Rea; Shirley; Turner; Kain; Davis; Sears.

As a result, the hearing officer should have excluded the evidence obtained in the illegal search at Scott's parole revocation hearing. Because this evidence was improperly admitted over Scott's objection, we must reverse and remand this case for a new revocation hearing. See Wagner v. Pennsylvania Board of Probation and Parole, 92 Pa.Cmwlth. 132, 498 A.2d 1007 (1985) (remand for a new hearing appropriate where hearsay evidence improperly admitted over parolee's objection); Grello v. Pennsylvania Board of Probation and Parole, 83 Pa.Cmwlth. 252, 477 A.2d 45 (1984) (same).

Scott next claims that the hearing officer erred in admitting Hahn's affidavit into evidence because it was hearsay evidence. In support of Counts 1(a) and 3(a) of the charges, the board

called Eric Hahn as a witness. (R., pp. 33- 52). However, at the hearing Hahn indicated that he was reluctant to testify. (R., pp. 33, 36-40). As a result, the board introduced an affidavit signed by Hahn to establish the alleged violations over Scott's objection. (R., pp. 40, 47). Hahn was questioned regarding the execution of the affidavit; however, he was not questioned on the substantive allegations contained therein. (R., pp. 34-35, 38-39, 40-47).

Scott then introduced another affidavit executed by Hahn which indicated that his prior affidavit was executed under pressure by parole agents. (R., pp. 47- 52). He also admitted the allegation contained in Count 1(a). (R., pp. 52- 55).[4]

In revocation hearings, documentary evidence and reports, including affidavits, may be used if the hearing examiner is satisfied as to their authenticity, relevancy, accuracy and reliability. 37 Pa.Code § 71.5(b). However, the introduction of hearsay evidence at a revocation hearing over counsel's objection where the hearing examiner fails to make a finding of good cause for admitting such evidence, constitutes reversible error. Wagner; Grello.

In this case, the hearing examiner admitted Hahn's affidavit over counsel's objection without making the requisite finding of good cause. As this was the only evidence introduced to show that

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[4]Scott notes that the affidavit was introduced by the board to show that he had committed Counts 1(a) and 3(a). However, because he admitted that he had committed Count 1(a), he was prejudiced by its admission only as it relates to proving that he committed Count 3(a).

Scott committed Count 3(a), we must reverse and remand for a new hearing on this claim as well. Wagner; Grello.

Based on our disposition of Scott's first two claims, we will not address the other claims raised on appeal. Accordingly, the order of the board is reversed and the case is remanded for a new hearing.

ORDER

NOW, this 30th day of November, 1995, the decision of the Pennsylvania Board of Probation and Parole, mailed November 9, 1994, at Parole No. 4488-X, is reversed, and this matter is remanded for proceedings consistent with this opinion.

Jurisdiction relinquished.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
OCT 30 1997
CLERK

No. 97-581

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

PENNSYLVANIA BOARD OF
PROBATION AND PAROLE,
Petitioner

VS.

KEITH M. SCOTT,
Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent asks leave to file the attached Brief in Opposition without payment of costs and to proceed in forma pauperis.

The Respondent is now represented by the Public Defender's Office of Luzerne County, Pennsylvania, which has approved his application for representation based on his economic status.

Respondent's affidavit or declaration in support of this motion is attached hereto.

Dated: 10/30/97

BASIL G. RUSSIN, ESQ.
Chief Public Defender

WILLIAM RUZZO, ESQ.
Assistant Public Defender

Office of the Public Defender
Luzerne County Court House
Wilkes-Barre, PA 18711
(717) 825-1766

18 p

PENNA. BOARD OF PROBATION AND PAROLE :

Petitioner : No. 97-581

vs. :

KEITH SCOTT : _____ **Term, 19__**

Respondent :

AFFIDAVIT

I, Keith Scott **being first duly sworn, depose and say that I am** Respondent **in the above entitled case; that in support of my motion for leave to proceed on petition for writ of certiorari in forma pauperis without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to redress.**

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? yes

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

.51 cents an hour
SCI DALLAS

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

_____

2. Have you received within the past twelve months any income from a business, profession or other form of self employment or in the form of rent payments, interest, dividends or other income? NO

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

_____

3. Do you own any cash or checking or savings account? NO

a. If the answer is yes, state the total value of the items owned.

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

_____

I UNDERSTAND THAT FALSE STATEMENTS OR ANSWERS TO ANY QUESTIONS IN THIS AFFIDAVIT WILL SUBJECT ME TO PENALTIES FOR PERJURY.

Dated this 2nd **day of** Oct. **, 1997**

Keith Scott

KEITH SCOTT, Respondent

3. Do you own any cash or checking or savings account? NO

a. If the answer is yes, state the total value of the items owned.

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

_____

I UNDERSTAND THAT FALSE STATEMENTS OR ANSWERS TO ANY QUESTIONS IN THIS AFFIDAVIT WILL SUBJECT ME TO PENALTIES FOR PERJURY.

Dated this 24th day of Oct., 1997

Keith Scott

KEITH SCOTT, Respondent

No. 97-581

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

PENNSYLVANIA BOARD OF
PROBATION AND PAROLE,

Petitioner

VS.

KEITH M. SCOTT,

Respondent

On Petition for Writ of Certiorari
to the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

By: BASIL G. RUSSIN, ESQ.
Chief Public Defender
Counsel of Record for Respondent

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QUESTIONS PRESENTED

1. Whether the exclusionary rule applies to a parole revocation hearing when the questioned evidence is seized without reasonable suspicion by an agent who knows of the parolee's status?

2. Whether a parolee is protected by the Fourth Amendment from an unreasonable search when he is required to sign a consent to search as a condition of parole?

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STATEMENT OF JURISDICTION

The judgment to be reviewed was entered by the Supreme Court of Pennsylvania on July 3, 1997. Petition for Writ of Certiorari was filed within ninety days. The Court has jurisdiction to review the decision by virtue of 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..... " U.S. Const. Amend. IV.

COUNTER-STATEMENT OF THE CASE

The issue in this case is not whether the exclusionary rule should apply as a general rule to all parole revocation hearings. Rather, it is whether the exclusionary rule should be applied to a parole revocation hearing when the agents seizing the protested evidence know or have reason to know of the parolee's status. Under these circumstances, the basis for application of the exclusionary rule is the deterrent of unlawful conduct by government agents.

The Supreme Court of Pennsylvania has held that in our case the offending agent searched Respondent Scott's residence without reasonable suspicion and with full, actual knowledge of Scott's parole status. It reasoned further that application of the exclusionary rule under these circumstances is a deterrent to unlawful government conduct.

The procedural history and the facts from which this case arose are set forth in accurate detail by the Supreme Court of Pennsylvania in its Opinion. (Pet. App. 1a-6a). Scott was taken into custody at a local diner by parole agents while he was on parole after release from a state sentence. One of the agents, Agent Mundro, then conducted a search of Scott's bedroom and found no evidence of parole violations. (Pet. App. 3a). He then searched adjacent rooms and found and seized weapons which were enclosed in cloth and bound with tape in the sitting room of Mrs. McDaniel, Scott's mother, in whose home Scott was residing.

Partly as a result of the seized weapons, the Pennsylvania Board of Probation and Parole conducted a revocation and introduced, overs Scott's objection, the weapons in question. (Pet. App. 3a-4a). Scott sought and received review in the Commonwealth

Court of Pennsylvania which held that the Board had violated Scott's right to be free from unreasonable searches. (Pet. App. 31a). Moreover, it held that the exclusionary rule must apply to Scott's revocation hearing. (Pet. App. 37a).

The Board requested allowance of appeal from the Supreme Court of Pennsylvania, and that Court granted the request. In its affirmance of the Commonwealth Court, the Pennsylvania Supreme Court set forth its reasoned basis for applying the exclusionary rule in the specific context of Scott's parole revocation hearing. The Board then filed a Petition for Writ of Certiorari with this Honorable Court. Respondent Scott, through counsel, the Public Defender's Office of Luzerne County, Pennsylvania, files this brief in opposition.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Neither the Decision Below Nor the Record Raises the Question of "Whether the Exclusionary Rule Applies to Parole Revocation Proceedings."

Petitioner presents as No. 1 of its Questions Presented "Whether the exclusionary rule applies to parole revocation proceedings.?" (Pet. I). Respondent suggests that the Pennsylvania Supreme Court has not ruled nor has Scott contended that the exclusionary rule must be applied to all parole proceedings or all revocation hearings. The Pennsylvania Supreme Court has held in our case only that a search based on mere conjecture by agents with actual knowledge of Respondent's parole status should be suppressed so that unlawful governmental conduct might be deterred.

Petitioner claims that the Pennsylvania Supreme Court recognizes its conclusion that the exclusionary rule should apply to the administrative function of parole revocation places it in conflict with a majority of U.S. Courts of Appeal that have addressed the issue. (Pet. 9). A close reading of the Pennsylvania Supreme Court Opinion will show that this claim is misleading. The Pennsylvania Supreme Court has reasoned that while a majority of the U.S. Courts of Appeal have agreed that the exclusionary rule is generally inapplicable to parole revocation hearings, two circuit courts have adopted a limited application of the exclusionary rule where the enforcement officers knew or had reason to know that the suspect was on probation. (Pet. App. 12a).

Additionally, Petitioner's reliance on U.S. v. Brazzano, 712 F.2d 826 (3d Cir. 1983), cert . denied sub nom Mollica v. U.S., 465 U.S. 1078 (1984) is misplaced. (Pet. 10). The Brazzano Court held that "in the absence of evidence that the offending agents knew that

the target of their search was a probationer, the deterrent effect of excluding evidence would be substantially attenuated." Id. At 826. That court reasoned further and pointedly that it did not reach the question of whether the exclusionary rule would apply if the police knew or should have known that their target was on probation. Id. at 826, n. 1.

Contrastingly in the case at bar, the agents knew of Scott's parole status and conducted an unreasonable search despite that knowledge. (Pet. App. 17a). The Pennsylvania Supreme Court, instantly, based its analysis on facts easily distinguishable from those in Brazzano where agents who seized evidence were of a different sovereign from that which sought to introduce evidence at a probation hearing in the U.S. District Court.

In addition to Brazzano, Petitioner cites to seven cases which, it contends, support the propositions that the exclusionary rule does not apply to parole/probation revocation proceedings and that the Pennsylvania Supreme Court decision here is in conflict with a majority of the U.S. Courts of Appeal. (Pet. 9, n. 5). This contention is faulty; the facts of the cited cases are distinguishable from those of the instant case. Not one of the cases cited by Petitioner in n.5 arose from a situation wherein officers seizing questioned evidence knew of the probation/parole status of the person from whom they seized evidence. In our case, the Pennsylvania Supreme Court distinguishes this case from those in which seizing officers do not know of a person's probation/parole status. That Court reasons that the distinction is crucial in that knowledge of the releasee's status is a necessary factor in effecting the policy of deterrence implicit in an application of the exclusionary rule.

An examination of cases cited by Petitioner in note 5 will reveal specific distinctions as set forth herein. In U.S. v. Finney, 887 F.2d 1048 (10th Cir. 1990), the Court reasoned that the state officers involved did not know of the probationer's status, thus it did not need to determine whether the exclusionary rule would apply if the officers knew of the probationer's status. Id. at 1048.

In U.S. v. Fredrickson, 581 F.2d 711 (8th Cir. 1978), state authorities without knowledge of the release status of their suspect searched for and seized gambling paraphernalia from a probationer. Later the federal probation officer relied on that evidence to move for revocation of probation. Here again the Court's Opinion reveals that the deterrent effect of the exclusionary rule would not apply since the seizing officers were not aware of the suspect's release status. Additionally, in Fredrickson, the Court held the complained-of search was not violative of the Federal Constitution or statutes.

Similarly, the remaining cases cited by Petitioner at Pet. 9, n. 5, all examine scenarios in which the agents seizing evidence were unaware of the probation/parole status of the suspects. See U.S. v. Vandermark, 522 F.2d 1019 (9th Cir. 1975) (Border search of a probationer where agents unaware of release status); U.S. v. Farmer, 512 F.2d 160 (6th Cir. 1975) (Parole revocation hearing convened only after F.B.I. agents searched probationer's premises for gambling paraphernalia); U.S. v. Brown, 488 F.2d 44 (9th Cir. 1973) (Police officers did not know object of their search was on probation); U.S. ex rel Sperling v. Fitzpatrick, 426 F.2d 1161 (2d. Cir. 1970) (Exclusionary rule was used as deterrent in state criminal proceedings thereby negating necessity for its deterrent effect in revocation proceedings).

Considering the foregoing analysis of the cited cases, Petitioner's initial Question Presented confronts this Honorable Court with answering a hypothetical question, "whether the exclusionary rule applies in general to all probation/parole revocation proceedings." Respondent suggests that by denying the Petition for Certiorari here, this Court will refrain from answering a question not before it.

II. This Court Has Held That a Parolee Has a Diminished But Still Valid Expectation of Privacy Under the Fourth Amendment.

Petitioner sets forth as its second Question Presented, "Whether a parolee has a reasonable expectation of privacy, entitled to Fourth Amendment protection, when he consents to a search of his residence as a condition of accepting parole?" Respondent suggests that this Court need not answer that question here since it has addressed and disposed of that issue in Griffin v. Wisconsin, 483 U.S. 868, 107 S. Ct. 3164, 97 L.Ed. 2d 709 (1987).

The Griffin Court held that, "A probationer's home like anyone else's is protected by the Fourth Amendment's requirement that searches 'be reasonable'." Id. At 873, 107 S. Ct. at 3168, 97 L.Ed. 2d. at 717. That Court continued its Fourth Amendment analysis by reasoning that although the probationer there was not entitled to the full panoply of Fourth Amendment protections, Wisconsin was required to comply with the reasonableness standard of the Fourth Amendment.

Keeping in mind that Griffin requires that a search of a probationer's home must comport with Fourth Amendment, we turn to an analysis of whether a search under a

state's regulation of releasees [a probationer in Griffin] is reasonable. The Griffin Court deferred to the State Court determination of reasonableness under Wisconsin's regulatory scheme for probationers.

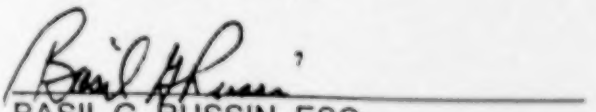
Similarly in our case, under the dictates of Griffin, we must turn to the Pennsylvania Supreme Court's analysis of the reasonableness of a search pursuant to Pennsylvania's regulatory scheme in governing its parolees. The Pennsylvania Supreme Court, in analyzing the effect of Respondent's signing a parole agreement, held that by signing the agreement he gave his parole officer the right to conduct only reasonable searches of his residence. Relying on that Court's reasoning in Comm. v. Williams, 547 Pa. 577, 692 A.2d 1031 (1997), the Pennsylvania Supreme Court held that Pennsylvania's regulatory scheme for parolees allows for a diminished expectation of privacy, but still provides the parolee with protection from unreasonable searches.

Since under the two-part analysis of Griffin, a parolee has Fourth Amendment protection from unreasonable searches, and it is for the State Court to determine the reasonableness of a search under its state's regulatory scheme, Respondent respectfully requests that this Honorable Court need not grant review to answer Petitioner's second "Question Presented".

CONCLUSION

Based upon the foregoing law and argument, the Respondent, Keith M. Scott, prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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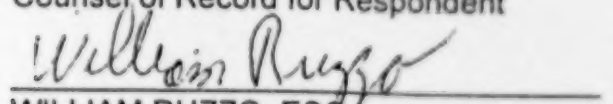

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(2)

Supreme Court, U.S.
FILED
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CLERK

No. 97-581

In The
SUPREME COURT OF THE UNITED STATES
October Term 1997

PENNSYLVANIA BOARD OF PROBATION AND PAROLE,

Petitioner,

v.

KEITH M. SCOTT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF OHIO, ARIZONA, ARKANSAS, CALIFORNIA, DELAWARE, DISTRICT OF COLUMBIA, HAWAII, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MASSACHUSETTS, MICHIGAN, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA AND VERMONT AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the exclusionary rule applies to evidence introduced at a parole revocation proceeding, and if not, whether the investigator's knowledge of the status of the parolee at the time of the search warrants an exception to this position?

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STATEMENT OF *AMICI* INTEREST

Amicus State of Ohio and 21 other *amici* States write to urge the Court to grant the petition of the Commonwealth of Pennsylvania in this case.

At stake is the applicability of the exclusionary rule to parole revocation proceedings. In applying this principle outside the context of a criminal proceeding and in excluding pertinent evidence of a significant parole violation, the Supreme Court of Pennsylvania has erected a novel principle of constitutional law, one that is not in keeping with precedent from this Court, exacerbates a growing conflict among the lower courts, and unnecessarily intrudes on the sensitive administration of the States' parole programs.

The *amici* States have a considerable interest in the proper operation of their parole systems. The availability of parole provides a useful tool for rehabilitating certain offenders and for preserving sufficient prison space for those others who for one reason or another continue to pose a danger to the public. All 50 States and the federal government have some form of early-release program. And approximately three-quarters of all adult offenders participate in some form of conditional release while serving a criminal sentence. J. Gobert & N. Cohen: *The Law of Probation and Parole*, § 1.01 (1983).

Parole programs also present unique administrative challenges.

> In parole releases, like its siblings probation release and institutional rehabilitation, few certainties exist. In each case, the decision differs from the traditional mold of judicial decision-making in that the choice involves a synthesis of record facts and personal observation filtered through the experience of

> the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community. This latter conclusion requires the Board to assess whether, in light of the nature of the crime, the inmate's release will minimize the gravity of the offense, weaken the deterrent impact on others, and undermine respect for the administration of justice.

Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 8 (1979) (footnotes omitted).

Making these decisions more difficult still is the frequency with which they must be made. The number of offenders on probation or parole nationwide has increased by more than two-thirds since 1987, from 1,798,390 to 2,999,287. As a result, the average case load of probation officers has risen from 111 to 301 offenders, a 179% increase, while the average case load of parole officers has risen from 94 to 164, a 74% growth. Criminal Justice Institute, Inc., *The Corrections Yearbook* 68-69, 72-73 (1988); *The Corrections Yearbook* 140-42, 148 (1997).

One of the most important tools for running a responsible early release program is to monitor the offenders' adjustment to release. Only by following the convict's activities outside the prison can the caseworker ensure that the premise of early release -- that the offender no longer poses a threat to public safety -- remains warranted. As explained by a leading commentator on the topic:

> The probation or parole officer has the primary responsibility for supervision of a parolee's or probationer's rehabilitative progress. This caseworker, charged with

> monitoring the offender's performance, owes a responsibility to the public to ensure that probationers and parolees who pose a threat to public safety are not permitted to remain free absent compliance with conditions which obviate possible danger.

J. Gobert & N. Cohen, *supra* at § 8.02 (emphasis added) (footnotes omitted).

In offering this brief for the Court's consideration, the *amici* States do not take the position that the Fourth (and Fourteenth) Amendment's prohibition against "unreasonable searches and seizures" has no application to parolees. The provision of course may well apply to prisoners who receive a discretionary early release (except of course when the parolee has agreed in advance to submit to unannounced and warrantless searches as a condition of parole). *See Wyman v. Jones*, 400 U.S. 309 (1971) (permitting government to condition social welfare benefits on the waiver of Fourth Amendment rights). Our point is a different one: Even assuming that the guarantee applies to parolees, the judicially-created exclusionary rule does not bar the admission of relevant evidence in a parole revocation proceeding. The deterrent values served by the rule, as we show below, have little force in the administrative context of a parole setting.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW EXACERBATES A CONFLICT IN THE LOWER COURTS ON THE QUESTION PRESENTED.

The petition should be granted, as an initial matter, because the decision below adds to a growing conflict of authority on the issues presented -- (1) the general question

whether the exclusionary rule applies to parole revocation proceedings, and (2) the more specific question whether the exclusionary rule should apply when the government official conducting the search has knowledge of the parolee's status.

With regard to the general question, every federal court of appeals except three has taken a position on the issue. *See* A-7 to A-8. On one side of the conflict, eight courts of appeals have determined that the exclusionary rule does not generally apply to such proceedings. *See United States v. Montez*, 952 F.2d 854 (5th Cir. 1992); *United States v. Finney*, 897 F.2d 1047 (10th Cir. 1990); *United States v. Bazzano*, 712 F.2d 826 (3d Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984); *United States v. Rea*, 678 F.2d 382 (2d Cir. 1982); *United States v. Frederickson*, 581 F.2d 711 (8th Cir. 1978); *United States v. Winsett*, 518 F.2d 51 (9th Cir. 1975); *United States v. Farmer*, 512 F.2d 160 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); *United States v. Hill*, 447 F.2d 817 (7th Cir. 1971). On the other side of the conflict, just one court of appeals has held that the exclusionary rule generally applies to parole revocation proceedings. *See United States v. Workman*, 585 F.2d 1205 (4th Cir. 1978).

At the State level, our research reveals that 32 jurisdictions have taken a position on this threshold question. *See* A-1 to A-6. On one side, 29 States have held that the rule generally does not apply to parole revocation proceedings. *See* A-1 to A-5 (citing cases). Three States, in contrast, have held that the rule generally does apply to exclude evidence of parole violations in this setting. *See Herrera v. State*, 745 S.W.2d 527 (Tex. App. 1988*); People ex rel Piccarillo v. New York State Bd. of Parole*, 397 N.E.2d 354 (N.Y. 1979); *Amiss v. State*, 219 S.E.2d 28 (Ga. App. 1975). Notably, these three states account for one-third of all probationers and parolees nationwide.

To be sure, with regard to the more specific question -- whether knowledge of the parolee's status alters the exclusionary rule calculation -- fewer courts have addressed the issue. Both the Pennsylvania Supreme Court (in the decision below) and the Second Circuit have held that the parolee's status, when known to the government official conducting the search, makes the exclusionary rule applicable in the parole setting. *See United States v. Rea*, 678 F.2d 382 (2d Cir. 1982). In addition, 18 State and federal courts, each of which has held that the exclusionary rule generally does not apply to parole hearings, have acknowledged that the outcome might be different if the investigative official knew the parolee's status. *See* A-2 to A-8 (Alabama, Arizona, Colorado, Washington, D.C., Indiana, Iowa, Louisiana, Maine, Massachusetts, North Carolina, Rhode Island, Virginia, West Virginia, Wisconsin, the Third, the Ninth, and the Tenth Circuits). None of the other courts addressing the issue has held that the parolee's status changes the outcome. *See* A-1 to A-8. And one court has held that knowledge of the parolee's status does not change matters, and thus specifically rejected the mode of analysis of the Second Circuit in *Rea* and the decision below in this action. *See Kansas v. Turner*, 891 P.2d 317 (Kan. 1995).

The breadth of this state-court and federal-court split of authority favors review. The lower federal and state courts first began addressing these issues in the early 1970s. *See In re: Martinez*, 463 P.2d 734 (Cal.), *cert. denied*, 400 U.S. 851 (1970) (exclusionary rule does not apply to parolees); *Anderson v. Commonwealth*, 470 S.E.2d 862 (Va. 1972) (exclusionary rule does not apply to parolees though the outcome might be different if the officer knew the parolee's status). In the 27 years since then, neither the general question (does the exclusionary rule apply in the parole context?) nor the specific question (does the rule apply when the investigator has

knowledge of the parolee's status?) has gone away. Little indication exists that the questions will be uniformly resolved anytime soon.

Plus, this case potentially gives the Court a chance to resolve both questions at once. Were the petition granted, respondent could prevail in this Court on either theory -- that the exclusionary rule generally applies to parole revocation hearings or at a minimum that the rule applies when the investigator knows the status of the object of the search.

We respectfully submit that this conflict of authority on the issues presented, together with the opportunity presented by this case potentially to address both issues at once, by itself warrants review now rather than later.

II. THE ISSUES RAISED BY THE PETITION ARE OF GREAT IMPORTANCE TO THE PUBLIC SAFETY AND EFFECTIVE OPERATION OF THE STATES' PAROLE SYSTEMS.

Not only does the petition present questions that have divided a large number of lower courts, but it also implicates a matter of great importance to the States. The impact of these important federal questions on the States' parole systems presents a second justification for review.

Day in and day out, parole officials face a daunting and sensitive task, one that leaves little room for the certainties of hindsight. They must decide whether and when convicted felons have become sufficiently rehabilitated to obtain early release, then they must ensure that the premise of that release -- that the parolee is not a threat to the public safety -- remains true throughout the probationary period. The citizenry pays a steep price when parole officials make miscalculations in this

area. *See generally Gronski v. State*, 700 P.2d 777, 779 (Wyo. 1985); *State ex rel. Stuzik v. Dept. of Health & Social Services*, 252 N.W.2d 660, 663 (Wis. 1977); *In Re: Martinez*, 463 P.2d 734, 740 (Cal.), *cert. denied*, 400 U.S. 851 (1970).

In order to perform this difficult task, it is exceedingly important that authorities be able to consider all relevant information. *United States ex rel. Spercing v. Fitzpatrick*, 426 F.2d 1161, 1165 (2d Cir. 1970) (Lombard, J., concurring); *United States v. Montez*, 952 F.2d 854, 859 (5th Cir. 1992); *Kain v. State*, 378 N.W.2d 900, 902 (Iowa, 1985). A constitutional interpretation that limits access to relevant information undermines parole officials' efforts to do their job.

> [T]he social consequences of imposing the exclusionary rule upon the authority can be disastrous. *Conceivably, if the improperly obtained evidence were the sole basis for parole revocation, the authority might find itself unable to act in the case of the paroled murderer whom the police improperly discovered had cached a minor armory* for future use or the parole narcotics peddler who had collected a quantity of heroin for future sale. Although we recognize of course, that such evidence would not be admissible in a court of law, we believe that an agency whose delicate duty is to decide when a convicted offender can be safely allowed to return to and remain in society is in a different posture than the court which decides his original guilt. *To blind the authority to relevant facts in this special context is to incur a risk of danger to the public which, at least as of this date, outweighs the competing considerations of a problematical gain in deterrence*. We thus conclude that at

> this time the . . . exclusionary rules are not applicable to Adult Authority proceedings.

In re: Martinez, 463 P.2d at 740 (emphasis added).

Commentators have come to a similar conclusion in considering the issue.

> Furthermore, *society needs to be protected by preventing the commission of additional offenses*. A recent Illinois decision noted:
>
> > [a] court sentencing an offender to probation takes a calculated risk that the offender's rehabilitation will progress better and that society will be adequately protected by the offender's return to the community under supervision.
>
> Obviously, the dangers inherent in this "calculated risk" fall primarily upon the public. *When the probationer has in fact violated the conditions of his probation, the danger to society is no longer a possibility but a certainty*. Thus, where verified factual information has shown the court's confidence to be misplaced, such evidence should not be excluded. Rather, the evidence should be admitted so that immediate steps can be taken to protect the public from the commission of additional offenses.

Note, *The Exclusionary Rule and Probation Revocation Proceedings*, 11 Val. U.L. Rev. 149, 156 (1976) (emphasis

added) (footnotes omitted) (quoting *People v. Dowery*, 312 N.E.2d 682, 685 (Ill. App. 1974)).

The sheer number of cases in this area, *see infra*, also points to the magnitude of this federal question. So too does the number of parolees affected by the issue. As of January 1, 1997, the States had nearly three million individuals on probation or parole. *Corrections Yearbook* 142 (1997). In the end, whether one looks at the impact of this issue through the lens of public safety, the frequency with which the issue arises or the number of parolees it affects, all illustrate the overwhelming significance of the federal question.

III. THE PENNSYLVANIA SUPREME COURT ERRED IN APPLYING THE EXCLUSIONARY RULE TO PAROLE REVOCATION PROCEEDINGS.

The lower court also erred in resolving the federal issue. This, too, favors review.

The Court has never held that the exclusionary rule applies to parole revocation proceedings, whether the offiicer knows the status of the parolee or not. Nor is there anything in the Court's opinions that supports such a wide-ranging expansion of *Mapp v. Ohio*, 367 U.S. 643 (1961). Quite to the contrary, what the Court has said on this score points in an opposite direction. In *Morrisey v. Brewer*, 408 U.S. 471, 489 (1972), the Court came close to endorsing the very distinction Pennsylvania has advanced in this case by emphasizing the administrative, non-adversarial nature of a parole revocation hearing:

> We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry,

> *the process should be flexible enough to consider evidence . . . that would not be admissible in any adversary criminal trial.*

(Emphasis added). The decision below is equally inconsistent with similar observations in *Griffin v. Wisconsin*, 483 U.S. 868, 873-874 (1987) ("A state's operation of a probation system ... presents 'special needs' beyond normal law enforcement that may justify departures from the usual . . . requirements."). *See also Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

The Court also previously has held that the exclusionary rule does not apply to administrative proceedings, a view that further undermines the Pennsylvania Supreme Court's decision. In *Immigration and Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Court specifically held that the rule does not apply to an administrative hearing in an area (like probation and parole) where officials must make a large number of difficult decisions in order to prevent ongoing violations of law. *Id.* at 1046 ("Applying the exlusionary rule in proceedings that are intended not to punish past transgressions but to prevent their continuances or renewal would require [decisionmakers] to close their eyes to ongoing violations of the law.") *See also Stone v. Powell*, 428 U.S. 465 (1976) (declining to apply exclusionary rule to habeas petitions).

In addition to these statements from the Court's decisions, the underlying rationale of the exclusionary rule does not extend to a parole revocation administrative hearing. The essential explanation for engrafting the exclusionary rule onto the Fourth Amendment was to deter future police misconduct. *Mapp v. Ohio*, 367 U.S. 643 (1961). Contrary to the lower court's conclusion, that concern simply does not apply whenever an officer knows the status of the parolee.

Imagine a law enforcement officer who sees what may or may not be a drug deal, knows one participant as a parolee, sees the other as a stranger, then conducts a warrantless search of both of them without probable cause. When the search produces evidence of a parole violation and it later turns out that the stranger also is a parolee, a knowledge-based approach would allow the fruits of the search to be admitted against the one but not the other. This makes little sense. *See Kansas v. Turner*, 891 P.2d 317, 323 (Kan. 1995).

The main justification for a knowledge-based limitation, moreover, is the specter that without one caseworkers could malevolently violate parolees' constitutional rights. Aside from improperly assuming that government officials will lightly breach their constitutional duties, *see Agostini v. Felton*, 66 U.S.L.W. 3253 (1997), this view contains a number of flaws. To begin with, nothing about our position indicates that the Fourth Amendment does not apply to parolees; only the exclusionary rule does not.

What is more, the continued existence of the exclusionary rule for criminal proceedings already acts as a strong deterrent against unconstitutional searches of all parolees, whether the police know their status or not. An officer that suspects criminal activity may be afoot is as apt to be interested in getting an arrest (and conviction) as a parole revocation. Only the oddest of fact patterns would tempt an officer to sacrifice a potential criminal conviction in order to obtain a parole revocation.

Finally, and perhaps most importantly, a knowledge-based approach does not in fact offer any additional deterrence against unauthorized searches. A police officer who conducts an unauthorized search violates the Constitution in one of two ways: Either the violation was inadvertent (i.e., negligent) or it

was intentional. In the event the violation was negligent, no extra deterrence follows from a knowledge-based limitation. The whole point of such a limitation is to prevent intentional, not negligent, unconstitutional searches -- in other words, to prevent just those searches that occur because the officers know the individuals to be parolees and think they can get away with the violations because the evidence may be used in a parole revocation proceeding. Under these circumstances, a knowledge-based limitation simply will not deter inadvertent violations; it will just exclude pertinent evidence.

No doubt, the same is not true for intentional violations. A knowledge-based limitation might well deter such transgressions, but it still offers no more deterrence than already exists. When police officers intentionally violate a citizen's consitutional rights, the exclusionary rule is the least of their worries. Such conduct exposes officials to individual-liability claims, internal discipline and worse. These threats provide all the deterrence anyone needs. Indeed, a contrary view posits a law enforcement officer more concerned about the potential exclusion of evidence than the potential for a money-damages action and self-advancement. While such concern for the public welfare is the hallmark of being a police officer, it hardly applies to the malevolent probation or parole officer that some lower courts have conjured in addressing this issue.

All things considered, the petition presents issues that have divided a wide number of lower courts, that implicate important federal questions, and that were incorrectly decided below.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to grant the writ.

Respectfully submitted,

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STATE AND FEDERAL DECISIONS ON THE APPLICABILITY OF THE FOURTH AMENDMENT EXCLUSIONARY RULE TO PROBATION/PAROLE REVOCATION PROCEEDINGS

I. State Decisions

A) Jurisdictions Applying the Exclusionary Rule

STATE	DECISION	NUMBER OF PERSONS ON PROBATION OR PAROLE*
Georgia	*Amiss v. State*, 219 S.E.2d 28 (Ga. App. 1975)	152,681
New York	*Piccarillo v. New York Board of Parole*, 397 N.E.2d 354 (N.Y. 1979)	231,551
Texas	*Herrera v. State*, 745 S.W.2d 527 (Tex.App. 1988)	509,655
Total Number on Probation and Parole*		**893,870**
Percentage of All State Probationers/Parolees*		**30.9%**

B) Jurisdictions Declining to Apply the Exclusionary Rule

STATE	DECISION	NUMBER OF PERSONS ON PROBATION OR PAROLE*
**Alabama	*Ex Parte Caffie*, 516 So.2d 831 (Ala. 1987)	21,015
**Arizona	*State of Arizona v. Towle*, 609 P.2d 1097 (Ct. App. 1980)	46,499
Arkansas	*Dabney v. State*, 278 Ark. 375, 646 S.W.2d 4 (Ark. 1983)	29,176
California	*In Re: Martinez*, 463 P.2d 734 (Cal.), *cert. denied*, 400 U.S. 851 (1970)	450,935
**Colorado	*People v. Wilkerson*, 541 P.2d 896 (Colo. 1975)	30,903
Connecticut	*Payne v. Robinson*, 541 A.2d 504 (Conn.), *cert. denied*, 488 U.S. 898 (1988)	55,652
**District of Columbia	*Thompson v. United States*, 444 A.2d 972 (D.C. App. 1982)	11,829

STATE	DECISION	NUMBER OF PERSONS ON PROBATION OR PAROLE*
Illinois	*People v. Dowery*, 62 Ill.2d 200, 340 N.E.2d 529 (Ill. 1974)	113,614
**Indiana	*Dulin v. State*, 169 Ind.App. 211, 346 N.E.2d 746 (Ind. App. 1976)	93,033
**Iowa	*Kain v. State*, 378 N.W.2d 900 (Iowa 1985)	18,035
Kansas	*State v. Turner*, 259 Kan. 864, 915 P.2d 753 (Kan. 1995)	23,042
**Louisiana	*State v. Davis*, 375 So.2d 69 (La. 1979)	50,701
**Maine	*State v. Caron*, 334 A.2d 495 (Me. 1975)	7,753
Maryland	*Chase v. State*, 522 A.2d 1348 (Md. 1975)	46,707
**Massachusetts	*Commonwealth v. Olsen*, 405 Mass. 491, 541 N.E.2d 1003 (Mass. 1989)	49,038
Michigan	*People v. Perry*, 201 Mich. App. 347, 505 N.W.2d 909 (Mich. 1993)	60,333

STATE	DECISION	NUMBER OF PERSONS ON PROBATION OR PAROLE*
Montana	*Thorsness v. State*, 165 Mont. 321, 528 P.2d 692 (Mont. 1974)	5,354
New Hampshire	*Stone v. Shea*, 113 N.H. 174, 304 A.2d 647 (N.H. 1973)	5,480
New Jersey	*State v. Bickman*, 285 N.J. Super 365, 666 A.2d 1386 (N.J. App. 1995)	128,087
**North Carolina	*State v. Lombardo*, 295 S.E.2d 399 (N.C. 1982)	117,067
Ohio	*State ex rel. Wright v. Ohio Adult Parole Authority*, 75 Ohio St.3d 82, 661 N.E.2d 728 (Ohio 1996)	17,828
Oklahoma	*Richardson v. State*, 841 P.2d 603 (Okla. 1992)	23,521
**Rhode Island	*State v. Spratt*, 386 A.2d 1094 (R.I. 1978)	19,121
Tennessee	*Barker v. State*, 483 S.W.2d 586 (Tenn. Crim. App. 1972)	34,079

STATE	DECISION	NUMBER OF PERSONS ON PROBATION OR PAROLE*
Utah	*Reeves v. Turner*, 28 Utah 310, 501 P.2d 1212 (Utah 1972)	12,756
**Virginia	*Anderson v. Commonwealth*, 51 Va. 437, 470 S.E.2d 862 (Va. 1972)	39,538
**West Virginia	*Hughes v. Gwinn*, 290 S.E.2d 5 (W.Va. 1981)	831
**Wisconsin	*State ex rel. Struzik v. Dept. of Health and Social Services*, 252 N.W.2d 660 (Wis. 1977)	52,463
Wyoming	*Gronski v. State*, 700 P.2d 777 (Wy. 1985)	3,755
	Total Number on Probation and Parole*	**1,568,145**
	Percentage of All State Probationers/Parolees*	**54.2%**

C) Jurisdictions That Have Not Decided Whether the Exclusionary Rule Applies

STATE	NUMBER OF PERSONS ON PROBATION OR PAROLE*
Alaska	3,754
Delaware	16,058

STATE	NUMBER OF PERSONS ON PROBATION OR PAROLE*
Florida	138,302
Hawaii	6,833
Idaho	6,580
Kentucky	16,310
Minnesota	10,185
Mississippi	12,154
Missouri	49,492
Nebraska	15,220
Nevada	12,976
New Mexico	9,262
North Dakota	2,673
Oregon	29,488
South Carolina	36,998
South Dakota	4,421
Vermont	8,779
Washington	51,440

Total Number on Probation and Parole* 430,925
Percentage of All State Probationers/Parolees* 14.9%

II. Federal Decisions

A) Circuits Applying the Exclusionary Rule

CIRCUIT	DECISION
***2nd U.S. Cir.	*United States v. Rea*, 678 F.2d 382 (2d Cir. 1982)
4th U.S. Cir.	*United States v. Workman*, 585 F.2d 1205 (4th Cir. 1978)

B) Circuits Declining to Apply the Exclusionary Rule

CIRCUIT	DECISION
**3rd U.S. Cir.	*United States v. Bazzano*, 712 F.2d 826 (3rd Cir. 1983)
5th U.S. Cir.	*United States v. Montez*, 952 F.2d 854 (5th Cir. 1992)
6th U.S. Cir.	*United States v. Farmer*, 512 F.2d 160 (6th Cir. 1975)
7th U.S. Cir.	*United States v. Hill*, 447 F.2d 817 (7th Cir. 1971)
8th U.S. Cir.	*United States v. Frederickson*, 581 F.2d 711 (8th Cir. 1978)
**9th U.S. Cir.	*United States v. Winsett*, 518 F.2d 51 (9th Cir. 1975)
**10th U.S. Cir.	*United States v. Finney*, 897 F.2d 1047 (10th Cir. 1990)

C) Circuits That Have Not Decided the Issue

CIRCUIT

1st U.S. Cir.

11th U.S. Cir.

District of Columbia Cir.

Key

*As of January 1, 1997, as reported in the *Corrections Yearbook* (1997)

**Recognizes, but does not answer, the question of the relevance of knowledge of the probationer's/parolee's status

***Recognizes that the rule is generally not applicable, but applies the rule based on knowledge of the probationer's status.

Supreme Court, U.S.
FILED
JAN 9 1998
CLERK

No. 97-581

In The Supreme Court Of The United States

OCTOBER TERM, 1997

PENNSYLVANIA BOARD OF
PROBATION AND PAROLE,
Petitioner

vs.

KEITH M. SCOTT,
Respondent

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

JOINT APPENDIX

LEONARD N. SOSNOV
210 East Willow Grove Ave.
Philadelphia, PA 19118
(215) 242-5940
Counsel for Respondent

GREGORY R. NEUHAUSER
Office of Attorney General
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 783-1471
Counsel for Petitioner

Petition for Certiorari filed September 30, 1997
Certiorari Granted November 26, 1997

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RELEVANT DOCKET ENTRIES

Date	Proceeding
	Commonwealth Court of Pennsylvania
12/08/94	Petition for Review filed
3/06/95	Petitioner/Appellant's Brief filed
3/06/95	Appellant's Reproduced Record filed
4/05/95	Respondent/Appellee's Brief filed
4/19/95	Reply Brief filed
11/30/95	Opinion Filed
	Supreme Court of Pennsylvania
1/02/96	Petition for Allowance of Appeal filed
5/15/96	Petition for Allowance of Appeal granted
6/27/96	Reproduced Record filed
7/15/96	Brief for Appellant filed
8/14/96	Brief for Appellee filed
8/28/96	Reply Brief for Appellant filed
7/03/97	Judgment entered

Pennsylvania Board of Probation and Parole

ORDER TO RELEASE ON PAROLE/REPAROLE

The Pennsylvania Board of Probation and Parole hereby grants parole/reparole to the prisoner named and on the sentences described below. It further ordered that he/she be released on the date indicated below, subject to Board approval of a satisfactory plan and to the Conditions Covering Parole/Reparole (PBPP-11) and upon condition that he/she commits no misconducts or crimes, and that no evidence of past crimes or mental illness, previously undiscovered, comes to light.

Name of Prisoner	ParNo.	Inst.No.	Authorized Date of Release
KEITH M. SCOTT	4488X	BV1645	*September 1, 1993

Place of Confinement	Date of Return (Reparole Cases Only)
STATE CORRECTIONAL INSTITUTION DALLAS	

County	Date of Sentence(s)	Tp	Term(s)/Indictment Number(s)	OTN(s)	Offense(s)/ Charges(s)
MONROE	04/02/92	CC	CP 830000398		MURDER 3

Judge(s)	Term(s) of Sentence(s)		Expiration Dates	
			Minimum	Maximum
RONALD E. VICAN	10YR	20YR	03/31/93	03/31/03

*TO THE INTENSIVE SUPERVISION DIVERSION RELEASE PROGRAM PROVIDING THERE ARE NO MISCONDUCTS AND YOU REMAIN INVOLVED IN REQUIRED PROGRAMS, ALSO SUBJECT TO AN APPROVED PLAN.

Agent Gallo
Type Report 15R
Late Assigned 9-2-93
Date Due 10-15-93
Date Extended /s/

Signed this *25th* day of *August, 1993* at Harrisburg, PA

PENNSYLVANIA BOARD OF PROBATION AND PAROLE

/s/ Allen Castor
Board Chairman
SEAL

Actual Date of Release September 1, 1993

CONDITIONS GOVERNING PAROLE/REPAROLE

To: Keith M. Scott Parole No. 4488-X

1. Report in person or in writing within 48 hours to the district court office or sub-office listed below, and do not leave that district without prior written permission of the parole supervision staff.

   SCRANTON DISTRICT OFFICE
   100 Samters Building
   101 Penn Avenue
   Scranton, PA 18503

2. Your approved residence is listed below and may not be changed without the written permission of the parole supervision staff.

   RD #1, Box 307-A
   307 Rena Drive & Long Mountain Road
   Effort, PA
   c/o Patricia McDaniel, mother

3. Maintain regular contact with the parole supervision staff by:
   a. reporting regularly as instructed and following any written instructions of the Board or the parole supervision staff.
   b. notifying the parole supervision staff within 72 hours of: (1) your arrest; or (2) your receipt of a summons or citation for an offense punishable by imprisonment upon conviction; and
   c. notifying the parole supervision staff within 72 hours of any change in status, including, but not limited to, employment, on-the-job training, and education.

4. Comply with all municipal, county, state and Federal criminal laws, as well as the provisions of the Vehicle Code (75 Pa.C.S. §101 et seq.), and the Liquor Code (47 P.S. §1-101 et. seq.)

5. You shall:
   a. abstain from the unlawful possession or sale of narcotics and dangerous drugs and abstain from the use of controlled substances within the meaning of the Controlled Substance, Drug, Device, and Cosmetic Act (35 P.S. §780-101 et seq.) without a valid prescription;
   b. refrain from owning or possessing any firearms or other weapons; and
   c. refrain from any assaultive behavior.

6. You shall pay fines, costs, and restitution imposed on you by the sentencing court. You shall establish with appropriate county authorities within thirty (30) days of your release from prison a payment schedule for the fines, costs and restitution owed for those cases for which you are now on state parole. Thereafter, you shall:
   a. pay these obligations according to the established payment schedule or as ordered by the court;
   b. provide proof of such payment to parole supervision staff; and
   c. keep the parole supervision staff and the court informed of any changes in your financial ability to pay fines, costs and restitution.

7. You shall comply with the special conditions listed on page 2 imposed by the Board and with special conditions imposed by the parole supervision staff.

Additionally, should problems arise, or questions occur concerning the conditions of your parole/reparole, consult with the parole supervision staff, and they will help you in the interpretation of the Conditions of

Parole/Reparole.

If you are arrested on new criminal charges, the Board has the authority to lodge a detainer against you which will prevent your release from custody, pending disposition of those charges, even though you may have posted bail or been released on your own recognizance from those charges.

If you violate a condition of your parole/reparole and, after the appropriate hearing(s), the Board decides that you are in violation of a condition of your parole/reparole you may be recommitted to prison for such time as may be specified by the Board.

If you are convicted of a crime committed while on parole/reparole, the Board has the authority, after an appropriate hearing, to recommit you to serve the balance of the sentence or sentences which you were serving when paroled/reparoled, with no credit for time at liberty on parole.

If you think that any of your rights have been violated as a result of your parole supervision, you may submit a timely complaint in writing, first to the district director of the district office through which you are being supervised. If your complaint is not resolved to your satisfaction, you may then submit your complaint in writing to the Pennsylvania Board of Probation and Parole, Director of Supervision, P.O. Box 1661, Harrisburg, Pennsylvania 17105-1661.

In consideration of being granted the privilege of parole/reparole by the Pennsylvania Board of Probation and Parole, I hereby agree that:

If I am ever charged with a parole violation arising out of my conduct while in a jurisdiction other than the Commonwealth of Pennsylvania, the revocation of my parole for that violation may be based solely on documentary evidence and I hereby waive any right to confront or cross-examine any person who prepared any such documentary evidence or who supplied information used in its preparation;

I expressly waive extradition to the Commonwealth of Pennsylvania from any jurisdiction in or outside of the United States, where I may be found, and I shall not contest any effort by any jurisdiction to return me to the United States or to the Commonwealth of Pennsylvania; and

I expressly consent to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any items, in the possession of which constitutes a violation of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.

To: KEITH M. SCOTT Parole No. 4488X Inst. No. BV-1645

SPECIAL CONDITIONS

YOU MUST ABIDE BY ALL OF THE SUPERVISION REQUIREMENTS IN THE INTENSIVE SUPERVISION DIVERSION RELEASE PROGRAM.
OUT-PATIENT DRUG, ALCOHOL, AND MENTAL HEALTH TREATMENT IS A SPECIAL CONDITION OF YOUR PAROLE SUPERVISION UNTIL THE TREATMENT SOURCE AND/OR PAROLE SUPERVISION STAFF DETERMINE IT IS NO LONGER NECESSARY. YOU WILL BE REQUIRED TO SIGN THE APPROPRIATE RELEASE FORM FOR CONFIDENTIAL INFORMATION.
YOU MUST SUBMIT TO URINALYSIS TESTING.
YOU MUST NOT CONSUME ALCOHOL UNDER ANY CONDITION OR FOR ANY REASON.
YOU MUST NOT ENTER ESTABLISHMENTS THAT SELL OR DISPENSE ALCOHOL.
YOU MUST TAKE PSYCHOTROPIC MEDICATION IF PRESCRIBED BY YOUR DOCTOR.
YOU MUST NOT CONTACT OR ASSOCIATE WITH THE VICTIMS OR THEIR FAMILY MEMBERS FOR ANY REASON.
YOU SHALL PAY A MONTHLY SUPERVISION FEE OF $25.00 TO THE PAROLE BOARD WHEN UNDER SUPERVISION WITHIN THE COMMONWEALTH OF PENNSYLVANIA (ACT 35 OF 1991).

/s/ Keith Scott	/s/
Signature of Parolee	Witness
8/31/93	
Date	Witness

Note: If signed by mark, there must be two witnesses to the execution of the instrument.

COMMONWEALTH OF PENNSYLVANIA
BOARD OF PROBATION AND PAROLE

WARRANT TO COMMIT AND DETAIN 4-5370

Date February 4, 1994

To the Superintendent, Warden, or other authorized representative of any Detention Facility or State Correctional Institution in the Commonwealth of Pennsylvania:

By virtue of the authority delegated to me by the Pennsylvania Board of Probation and Parole, you are hereby authorized and directed to commit and detain for violation of parole/~~probation~~ Keith M. Scott, Parole No. 4488-X, paroled on 9-1-93 from SCI-Dallas, Institution No. BV-1645 subject to further order of the Board.

PENNSYLVANIA BOARD OF PROBATION AND PAROLE

By:

/s/ Michael C. Baker
District Director
Michael C. Baker

PENNSYLVANIA BOARD OF PROBATION AND PAROLE

NOTICE OF CHARGES AND HEARING

Name Keith M. Scott Date February 4, 1994

Parole No. 4488-X Photo No. _____ PCP No. _____

You are charged with the following: Technical Parole Violations

1. Violation of Condition No. 5b: YOU SHALL REFRAIN FROM OWNING OR POSSESSING ANY FIREARMS OR OTHER WEAPONS. (3 counts)

a. On 9-4-93, you were in possession of a 22 Magnum revolver pistol.

b. During September of 1993, you were in possession of a 10 millimeter Glock handgun.

c. On 2-4-94, the following weapons were confiscated from your approved residence: one (1) Mossberg 12 gauge pump shotgun, serial no. G878391; one (1) Glenfield 12 gauge bolt action shotgun, serial no. 71357747; one (1) Stevens 12 gauge single shotgun, no serial number; one (1) Harrington-Richardson 12 gauge single shotgun, serial no. 918060; one (1) Glenfield .22 caliber semi-automatic, Model 60, serial no. 23506068, and one (1) Green Camo-Colored Compound bow plus three arrows.

2. Violation of Condition No. 5c: YOU SHALL REFRAIN FROM ANY ASSAULTIVE BEHAVIOR.

During November of 1993, you threatened a co-worker, Gerald Thomas, by approaching Mr. Thomas and stating "I am going to fuckin kill you" numerous times.

3. Violation of Condition No. 7, Special Condition: YOU MUST NOT CONSUME ALCOHOL UNDER ANY CONDITION OR FOR ANY REASON. (2 counts)

a. On or about 9-2-93, you consumed Zima Clear Malt alcoholic beverages.

b. On or about 1-18-94, you consumed Southern Comfort alcoholic beverages.

As a result, a Preliminary hearing will be held. Your rights for this hearing are indicated on the reverse side.

Hearing Date and Time February 18, 1994

Public Defender: 10:00 a.m.
Monroe County Court House
Stroudsburg, PA 18360 Location: Monroe County Correctional Facility

cc: Public Defender
Monroe CCF /s/ Donald J. Week for
Hearing Examiner Judge Signature
Agent
File Floyd J. Gallo, Parole Agent II
Title

RIGHTS AT ALL BOARD HEARINGS

You have the right to: (1) speak; (2) have voluntary witnesses appear on your behalf; and (3) present affidavits and other evidence. You have the right to be represented by retained counsel. On the reverse side are listed the name and address of the public defender of the county in which you are incarcerated. You may request a continuance of the hearing for good cause. The Board will send notice of its determination either to you or to counsel if you were represented at the hearing.

PRELIMINARY HEARING RIGHTS

The Board has ordered your detention as a result of the technical parole violation(s) charged on the reverse side and has scheduled a preliminary hearing before an examiner to determine whether there is probable cause to believe that you committed the violation(s). If the examiner finds probable cause, the Board may schedule a violation hearing to determine whether you should be recommitted as a technical violator.

VIOLATION HEARING RIGHTS

The Board has scheduled a violation hearing to determine whether you should be recommitted as a technical violator because of the violation(s) charged on the reverse side. You have a right to be heard by a panel.

You have a right to representation by free counsel at this hearing if you are unable to afford counsel.

DETENTION HEARING RIGHTS

The Board has ordered your detention as the result of the new criminal charge(s) listed on the reverse side, and has scheduled a detention hearing before an examiner to determine whether you should be detained pending disposition of the charge(s).

REVOCATION HEARING RIGHTS

The Board has scheduled a revocation hearing to determine whether you should be recommitted as a convicted violator because of the conviction(s) charged on the reverse side. You have a right to be heard by a panel.

You have a right to representation by free counsel at this hearing if you are unable to afford counsel.

PENNSYLVANIA BOARD OF PROBATION AND PAROLE
NOTICE OF CHARGES AND HEARING

Name Keith M. Scott Date March 23, 1994

Parole No. 4488-X Photo No. _____ PCP No._____

You are charged with the following:

TECHNICAL PAROLE VIOLATIONS!

VIOLATION OF CONDITION NO. 5B: YOU SHALL REFRAIN FROM OWNING OR POSSESSING ANY FIREARMS OR OTHER WEAPONS (THREE COUNTS).

A) On 9/4/93, you were in possession of a 22 Magnum revolver pistol.

B) During September 1993, you were in possession of a 10 Millimeter Glock handgun.

C) On 2/4/94, the following weapons were confiscated from your approved residence: One (1) Mossberg 12 gauge pump shotgun, serial no. G878391; one (1) Glenfield 12 gauge bolt action shotgun, serial no. 71357747; one (1) Stevens 12 gauge single shotgun, serial no. 918060; one (1) Glenfield .22 caliber semi-automatic, Model 60, serial no. 23506068, and one (1) Green Camo-Colored Compound bow plus three arrows.

Violation of Condition #5C: YOU SHALL REFRAIN FROM ASSAULTIVE BEHAVIOR.

During November of 1993, you threatened a co-worker, Gerald Thomas, by approaching Mr. Thomas and stating "I am going to fuckin kill you" numerous times.

VIOLATION OF CONDITION NO. 7, SPECIAL CONDITION: YOU MUST NOT CONSUME ALCOHOL UNDER ANY CONDITION OR FOR ANY REASON (TWO COUNTS).

A) On or about 09/02/93, you consumed Zima Clear Malt alcoholic beverages.

B) On or about 01/18/94, you consumed Southern Comfort alcoholic beverages.

As a result, a VIOLATION hearing will be held. Your rights for this hearing are indicated on the reverse side.

Hearing Date and Time: March 30, 1994

9:30 a.m.

Public Defender:
Luzerne County Public Defender's Office
Court House Annex
Wilkes-Barre, PA 18702

Location: Dallas State Correctional Institution
Drawer K, Follies Road
Dallas, PA 18612

cc: Parole Agent Gallo
Joseph Gober, IPR
Luzerne Co. Public Defender
Hearing Examiner's file

/s/ John G. Engle, Jr./ah
Signature
John G. Engle, Jr.
Regional Hearing Examiner
Title

RIGHTS AT ALL BOARD HEARINGS

You have the right to: (1) speak; (2) have voluntary witnesses appear on your behalf; and (3) present affidavits and other evidence. You have the right to be represented by retained counsel. On the reverse side are listed the name and address of the public defender of the county in which you are incarcerated. You may request a continuance of the hearing for good cause. The Board will send notice of its determination either to you or to counsel if you were represented at the hearing.

PRELIMINARY HEARING RIGHTS

The Board has ordered your detention as a result of the technical parole violation(s) charged on the reverse side and has scheduled a preliminary hearing before an examiner to determine whether there is probable cause to believe that you committed the violation(s). If the examiner finds probable cause, the Board may schedule a violation hearing to determine whether you should be recommitted as a technical violator.

VIOLATION HEARING RIGHTS

The Board has scheduled a violation hearing to determine whether you should be recommitted as a technical violator because of the violation(s) charged on the reverse side. You have a right to be heard by a panel.

You have a right to representation by free counsel at this hearing if you are unable to afford counsel.

DETENTION HEARING RIGHTS

The Board has ordered your detention as the result of the new criminal charge(s) listed on the reverse side, and has scheduled a detention hearing before an examiner to determine whether you should be detained pending disposition of the charge(s).

REVOCATION HEARING RIGHTS

The Board has scheduled a revocation hearing to determine whether you should be recommitted as a convicted violator because of the conviction(s) charged on the reverse side. You have a right to be heard by a panel.

You have a right to representation by free counsel at this hearing if you are unable to afford counsel.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA BOARD OF PROBATION & PAROLE

	:	PAROLE NO. 4488-X
KEITH SCOTT	:	
Parolee	:	

* * *

Before: John Engle
Hearing Examiner

Hearing Date: March 30, 1994

Location: SCI - Dallas

APPEARANCES:

Keith Scott
Parolee

George Westerfield
Counsel

Floyd Gallo
Parole Agent

Witnesses for Parole Agent:

Eric Hahn
Ray Opperlee

Larry Mundro
Loren Dunham

Witnesses for Defense:

John McDaniel
Donald Byrnes

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PROCEEDINGS

HEARING EXAMINER ENGLE: I'd like the record to show that this is a scheduled violation hearing in the case of Keith Scott, S-c-o-t-t. Mr. Scott's parole number is 4488-X. Today is March the 30th, 1994, at the State Correctional Institution at Dallas. Persons present for this hearing in addition to Mr. Scott are his attorney, George Westerfield, parole agent is Floyd Gallo, and the Hearing Examiner is John Engle. There are witnesses to be called in this case, both by the State and by Defense. Those witnesses will be introduced at the time they're brought to the hearing room to testify. I'd like the record to show also that the State and Defense witnesses have been sequestered for purposes of this hearing. Mr. Scott, a violation hearing is the final hearing you'll have with regard to these allegations before the Board makes a final Decision. Since it is the final hearing, do you understand that you have the right to have this matter heard personally by two people commonly called a panel hearing? Do you know what a panel hearing is, Mr. Scott?

MR. SCOTT: Yes, sir.

HEARING EXAMINER ENGLE: Okay. Do you wish to have a panel hearing?

MR. SCOTT: No, sir.

HEARING EXAMINER ENGLE: It appears, Mr. Scott, that you may on February the 23rd, 1994, given preliminary

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HEARING EXAMINER ENGLE: (cont'd) indication of your intent to waive a panel hearing. I ask you now is this your signature on this waiver of panel hearing?

MR. SCOTT: Yes, sir.

HEARING EXAMINER ENGLE: I'm going to reaffirm your waiver, and we'll go forward with the final hearing today. Any questions about the wavier, Mr. Scott?

MR. SCOTT: No, sir.

HEARING EXAMINER ENGLE: Mr. Scott and Mr. Gallo, you may remain seated. Would you raise your right hands please? Do you swear any testimony you give at this violation hearing to be the truth, the whole truth, and nothing but the truth so help you?

MR. SCOTT: Yes, sir.

MR. GALLO: Yes.

HEARING EXAMINER ENGLE: Thank you. I'm required, Mr. Scott, to take official notice of some of the information contained in the heading of this arrest report that's the document that's before you now. I'll point out the information to which I'm going to take notice as I read it into the record. This document indicates that Keith Scott is currently serving a ten (10) year to twenty (20) year sentence from Monroe County, Pennsylvania, for the offense of Murder, Third Degree. The current maximum expiration date on this sentence stands at March the 31st in the year 2003. Have you any questions about

[PAGE 5]

HEARING EXAMINER ENGLE: (cont'd) any of that information, Mr. Scott?

MR. SCOTT: No, sir.

HEARING EXAMINER ENGLE: One other bit of information that I have available here is a copy of the Release Order on that ten (10) to twenty (20) year sentence along with the attending conditions of parole for parole supervision under that sentence. This Release Order indicates a release on parole date of September 1, 1993. -Is that

date correct?

MR. SCOTT: Yes, sir.

HEARING EXAMINER ENGLE: Now, you had a question about that?

MR. SCOTT: I was just interested in seeing the conditions of parole.

HEARING EXAMINER ENGLE: Sure.

MR. SCOTT: Could I ask a question please?

HEARING EXAMINER ENGLE: Sure.

MR. SCOTT: The definition of intensive supervision?

HEARING EXAMINER ENGLE: Okay. Let's go back to that. Let me read this document, and we'll ask Mr. Gallo to respond to that. For the record, these are conditions that Mr. Gallo [*sic*] currently has as he's still on parole under the ten (10) to twenty (20) year sentence. And his question is with regard to the first condition, I believe, which reads here, "You must

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HEARING EXAMINER ENGLE: (cont'd) abide by all supervision requirements in the intensive supervision diversification release program." And your question is what, Mr. Scott? What are the

requirements?

MR. SCOTT: What exactly is intensive supervision? Like the amount?

MR. GALLO: Well, I would say at least twice a month or more I would take a urinalysis on him, and I would make sure that he was going to his various programs, mental health, and stuff like that. And I mostly would see him as much as I could possibly see him.

HEARING EXAMINER ENGLE: So is it fair to say, Mr. Gallo, that by definition, the intensive supervision requirements - - under those requirements a parole agent is obliged to see a parolee as frequently as possible?

MR. GALLO: As possible.

HEARING EXAMINER ENGLE: Is that the idea of the program?

MR. GALLO: Depending upon the caseload and, you know, the circumstances and all, and I would see Mr. Scott at least twice a month.

HEARING EXAMINER ENGLE: Is there a minimum requirement? In other words, are you required, Mr. Gallo, to see Mr.

Scott. . .

MR. GALLO: Yes. He was considered a maximum

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MR. GALLO: (cont'd) case, and I was required to see him twice a month; plus I was required or obliged to follow up that visitations with collateral contact such as. . .

HEARING EXAMINER ENGLE: Collateral contacts meaning?

MR. GALLO: Police department, people that knew him in the neighborhood or the community and the mental health (INAUDIBLE).

HEARING EXAMINER ENGLE: Does that answer your question, Mr. Scott?

MR. SCOTT: I just have one question concerning urinalysis.

HEARING EXAMINER ENGLE: Sure, go ahead.

MR. SCOTT: Is that something that's supposed to be done on each visit?

MR. GALLO: No. It's not done on each visit. It was done whenever I felt the need for it.

MR. SCOTT: So that's not a prerequisite for intensive supervision?

MR. GALLO: You must submit to it. That's what you have to do.

And there's not a minimum, and there's not a maximum urinalysis.

HEARING EXAMINER ENGLE: Does that answer your question, Mr. Scott?

MR. SCOTT: Yes, sir.

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HEARING EXAMINER ENGLE: Now, I think we're ready to go forward. I understand, Mr. Westerfield, that there's not going to be any admissions to any of these charges so we'll hear the witnesses and their testimony with regard to each.

MR. WESTERFIELD: Yeah.

HEARING EXAMINER ENGLE: Well, I don't know whether we have witnesses present here or not. Are you ready to go, Mr. Gallo, with . . .

MR. GALLO: Yes, I am.

HEARING EXAMINER ENGLE: . . . condition 5b, count A? Do you need to call a witness for that?

MR. GALLO: Yes, sir. I would call Mr. Eric Hahn.

HEARING EXAMINER ENGLE: Okay. We'll go off the record till the witness is available.

(OFF THE RECORD)

HEARING EXAMINER ENGLE: We're back on the record. The first witness called by the State is in the hearing room. Sir, could I ask you to state your full name for the record please?

MR. HAHN: Eric Hahn.

HEARING EXAMINER ENGLE: You may remain seated, Mr. Hahn. Would you raise your right hand? Mr. Hahn, do you swear any testimony you give at this hearing will be the truth, the whole truth, and nothing but the truth so help you?

MR. HAHN: Yes.

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HEARING EXAMINE ENGLE: Mr. Hahn, may I have your address please?

MR. HAHN: HCR1, Box 536, Sciota, Pennsylvania.

HEARING EXAMINER ENGLE: Will you spell it please?

MR. HAHN: S-c-i-o-t-a.

HEARING EXAMINER ENGLE: Your witness, Mr. Gallo.

MR. GALLO: Mr. Hahn, do you remember. . .

MR. HAHN: Excuse me.

MR. GALLO: Yes, sir.

MR. HAHN: You said if I chose not to testify, I didn't have to testify.

MR. GALLO: I said I can't make you testify.

MR. HAHN: Well, I don't want to testify.

MR. GALLO: Okay. May I view Mr. Hahn as a hostile witness?

HEARING EXAMINER ENGLE: I assume that during your investigation that you have some idea as to what Mr. Hahn might testify to at this hearing?

MR. GALLO: Yes, I do, sir. I have a sworn statement given by Mr. Hahn on 2/4/1994.

HEARING EXAMINER ENGLE: You do?

MR. GALLO: Yes, sir. It was taken by Notary Public Doris Antley (ph) Baker in the Scranton District Office.

HEARING EXAMINER ENGLE: Okay. Mr. Hahn, do you recall having given that statement?

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MR. HAHN: Yes.

MR. WESTERFIELD: I would, of course, object to either treating

Mr. Hahn as a hostile witness or admitting any hearsay statements.

MR. GALLO: I think that Mr. Hahn's statement should be allowed to be entered into evidence as it is the prior statement, and it shows that Mr. Hahn did swear to the statement that was taken and (INAUDIBLE) sealed (INAUDIBLE) witnesses.

MR. WESTERFIELD: Your Honor, the purpose of these hearings is for the Department to present its evidence, and it has to present evidence that at least to some extent it's consistent with the rules of evidence.

HEARING EXAMINER ENGLE: I hope so.

MR. GALLO: Well, a preconsistent statement given by a Defendant if the Defendant previously testified is admissible.

MR. WESTERFIELD: Not in any book I ever saw.

HEARING EXAMINER ENGLE: We're going to recess, gentlemen, for five minutes.

(OFF THE RECORD)

HEARING EXAMINER ENGLE: We're back on the record after a brief recess. Let me see that Affidavit, Mr. Gallo. Mr. Hahn, I'm going to show you this document, and I want to know whether or not

you signed this and made that statement?

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MR. HAHN: Yes.

HEARING EXAMINER ENGLE: Mr. Hahn, if you signed this - - if you made this statement, and you indicated that you have signed this Affidavit on the 4th of February 1994, what's your reluctance to testify today?

MR. HAHN: (INAUDIBLE).

HEARING EXAMINER ENGLE: You acknowledge that you made that statement on February the 4th. Why are you reluctant to testify today?

MR. HAHN: Well, a number of reasons. First of all, when we made these statements, we were assured that he would not know the charges until the first hearing. And the parole people were told that my son would lose thousands of dollars if they weren't telling us the truth. And he received the charges the day he was arrested, and my son lost over $60,000.

HEARING EXAMINER ENGLE: How does your son figure into this?

MR. HAHN: He was partners with Keith's mother in the building.

HEARING EXAMINER ENGLE: Okay.

MR. HAHN: (INAUDIBLE) owns this business.

HEARING EXAMINER ENGLE: This tape recorder doesn't know and doesn't understand any of this, okay, so for my benefit and the tape recorder's, let's back up a little bit,

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HEARING EXAMINER ENGLE: (cont'd) Mr. Hahn. Now, the question is you're reluctant to testify today after acknowledging that you made that statement on February the 4th.

MR. HAHN: Also . . .

HEARING EXAMINER ENGLE: The reason you're telling me that you're reluctant to testify is that if you testify, your son will or has lost business?

MR. HAHN: Yes.

HEARING EXAMINER ENGLE: And your son is a contractor?

MR. HAHN: Yes.

HEARING EXAMINER ENGLE: And what would cause your son to lose business if you testify?

MR. HAHN: Well, they were told that. . .

HEARING EXAMINER ENGLE: Who is they?

MR. HAHN: The parole people were told that Keith's mother would retaliate immediately.

HEARING EXAMINER ENGLE: Who told the parole people that?

MR. HAHN: My son Dan and I did.

HEARING EXAMINER ENGLE: Okay. And so what you're saying - - now, who is Mr. Scott's mother?

MR. HAHN: Patty McDaniels.

HEARING EXAMINER ENGLE: Ms. Patty McDaniels?

MR. HAHN: Yes.

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HEARING EXAMINER ENGLE: And she does business with your son?

MR. HAHN: Not anymore. That's not the biggest reason at all. I feel my wife put me in this state of mind, and I'm not sure anymore if it was justified. I was afraid for my granddaughter's life, and my wife is - - has a lot of problems, and I think that I was taken advantage of.

HEARING EXAMINER ENGLE: When?

MR. HAHN: All the time. . .

HEARING EXAMINER ENGLE: You mean when you made the statement?

MR. HAHN: No. All the time that he was out.

HEARING EXAMINER ENGLE: (INAUDIBLE) out, but are you suggesting now that the main reason you're reluctant to testify is that you are afraid for your family members. . .

MR. HAHN: Oh, no. No, no. The reason I made this statement is I was told that there was threats against my granddaughter. At this point, I do not believe my wife anymore. She's a sick person.

HEARING EXAMINER ENGLE: Where's that Affidavit?

MR. HAHN: Well, I'm not saying - - I told you that that . . .

HEARING EXAMINER ENGLE: Now, you're under oath, and you're going to get yourself in trouble here, and I want to advise you of something first. Okay? That if this Affidavit

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HEARING EXAMINER ENGLE: (cont'd) is not the truth, you could be arrested on criminal - - no, wait. Don't answer. If this

Affidavit is not the truth, you could be arrested on criminal charges. If you don't tell the truth at this hearing, okay, you could be charged with criminal charges. So I want you to think carefully before you say anything.

MR. HAHN: I didn't say it wasn't the truth.

MR. WESTERFIELD: Your Honor, with all due respect, if this witness is going to be threatened - - he's ordered upon to testify - - if he's going to be threatened with perjury charges, he needs a lawyer. He needs to be advised before he's forced to testify.

HEARING EXAMINER ENGLE: He's not being threatened, Mr. Westerfield. Let's make sure the record's clear. I'm trying to be fair to the witness.

MR. WESTERFIELD: Well, Your Honor, when you tell him that he can be charged with a criminal offense for making false statements, I think he's in the position where he at least - - I at least understand that to mean either you tell the truth or he can get charged with a criminal offense. He said he doesn't want to testify, and I think that pushing him beyond that except by using contempt power, if that's appropriate, is putting him in a position where he's kind of damned if he does and

damned if he doesn't. If he says that what was said in the Affidavit isn't true, then you've told him he could be charged

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MR. WESTERFIELD: (cont'd) with a criminal offense. If he says something false today, you've told him he can be charged with a criminal offense.

HEARING EXAMINER ENGLE: You're remaining reluctant to testify in any case. Is that right, Mr. Hahn?

MR. HAHN: Yes.

HEARING EXAMINER ENGLE: Okay. This document's going to be accepted and made part of the record. Counsel, would you like to look at the document?

MR. WESTERFIELD: Yes, Your Honor.

HEARING EXAMINER ENGLE: Do you have any questions of the author?

MR. WESTERFIELD: I've stated my objection to admission, and I take it this is accepted subject to those objections?

HEARING EXAMINER ENGLE: Your objection is noted for the record. It's overruled.

MR. WESTERFIELD: Thank you. Mr. Hahn, who was present when this statement was taken?

MR. HAHN: Floyd Gallo and I believe two other men, but I don't know their names.

MR. WESTERFIELD: Parole officers?

MR. HAHN: Yes.

MR. WESTERFIELD: Did you type this?

MR. HAHN: No.

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MR. WESTERFIELD: Who typed it?

MR. HAHN: It was the notary girl there, I think.

MR. WESTERFIELD: And was that a person at the notary at the Bureau of Probation and Parole Office in Scranton?

MR. HAHN: Yes.

MR. WESTERFIELD: The notary is a Lackawanna County notary I see from the document. You don't live in Lackawanna County. Right?

MR. HAHN: No.

MR. WESTERFIELD: You live in Monroe County?

MR. HAHN: Yes.

MR. WESTERFIELD: And how did you happen to be at the Probation and Parole Office that day when this Affidavit was executed?

MR. HAHN: Well, they asked us to come up and make a statement.

MR. WESTERFIELD: And who dictated the words or who came up with the words that are in this statement?

MR. HAHN: Exact words?

MR. WESTERFIELD: Yes, sir.

MR. HAHN: I don't know.

MR. WESTERFIELD: I mean, did you dictate to the person who was typing? Are these your words?

MR. HAHN: Not verbatim but it's . . .

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MR. WESTERFIELD: Did you hear one of the parole officers dictate the words or tell the typist what to type?

MR. HAHN: No. I was just given it to read over and sign it.

MR. WESTERFIELD: Was it composed by the typist in your presence, or was that done in another room?

MR. HAHN: In another room.

MR. WESTERFIELD: So you weren't present when the parole officers and the typist prepared this statement?

MR. HAHN: No.

MR. WESTERFIELD: That was done in another room. They had brought it in and presented it to you, and you signed it?

MR. HAHN: Yes.

MR. WESTERFIELD: How many drafts of this statement were prepared? Was there just one?

MR. HAHN: One.

MR. WESTERFIELD: Were you advised by parole officers that you didn't have to sign this Affidavit and that there was no compulsion on you to give an Affidavit?

MR. HAHN: Yeah, they advised me of that.

MR. WESTERFIELD: Did they offer you - - did they tell you that if you sign this Affidavit they would be able to use it to get Mr. Scott arrested and get him off the streets?

MR. HAHN: Yes.

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MR. WESTERFIELD: And were you anxious to have him out of the way, as it were, by having him back in jail?

MR. HAHN: Yes.

MR. WESTERFIELD: And that was for several reasons, wasn't it?

MR. HAHN: Yes.

MR. WESTERFIELD: One was that you believed that Mr. Scott was involved romantically with your wife?

MR. HAHN: Yes.

MR. WESTERFIELD: And you'd been advised by the parole officers that Mr. Scott would make threats against your grandchildren - - I'm sorry - - not by the parole officers - - you had been advised by your wife Mr. Scott had made threats against your grandchildren?

MR. HAHN: Yes.

MR. WESTERFIELD: And you now believe that those statements by your wife were false. Is that right?

MR. HAHN: Yes.

MR. WESTERFIELD: So is it true that your primary motivation in giving this Affidavit was to see that Mr. Scott was sent back to jail?

MR. HAHN: Yes.

MR. WESTERFIELD: And that was on the basis of your personal interest in Mr. Scott's romantic activities with your wife and the statements your wife had made to you which

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MR. WESTERFIELD: (cont'd) you now believe to be false about the threats?

MR. HAHN: Yes.

MR. WESTERFIELD; The two incidents that are mentioned in this Affidavit according to what's stated here took place September 2, 1993, and September 4, 1993. Is that right? Did you answer?

MR. HAHN: Yes.

MR. WESTERFIELD: And the Affidavit was February 4, 1994. Did you tell any of the parole officers about either of these incidents, say, within a week after they occurred during the first half of September of '93?

MR. HAHN: No.

MR. WESTERFIELD: You were aware that Mr. Scott was on parole?

MR. HAHN: Yes.

MR. WESTERFIELD: But it wasn't until when that you first advised

the parole officers of these two incidents?

MR. HAHN: Well, the first time that I talked to Floyd.

MR. WESTERFIELD: Which was when?

MR. HAHN: I guess it would be in February right before that was signed.

MR. WESTERFIELD: Okay. So that would have been October, November, December, January, February, almost - -

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MR. WESTERFIELD: (cont'd) certainly a lot more than four months - - almost five months after these incidents allegedly happened?

MR. HAHN: Yes.

MR. WESTERFIELD: And had you been visited by Mr. Gallo or talked to Mr. Gallo at anytime during that four or five-month interim?

MR. HAHN: [No audible reply.]

MR. WESTERFIELD: May I have a moment?

HEARING EXAMINER ENGLE: Off the record.

(OFF THE RECORD)

HEARING EXAMINER ENGLE: We're back on the record.

MR. WESTERFIELD: I don't have any other questions.

HEARING EXAMINER ENGLE: Mr. Gallo, do you have any questions about this document?

MR. GALLO: Yes, I have.

HEARING EXAMINER ENGLE: Go ahead. Let the record show it's S-1, Affidavit by Mr. Hahn.

MR. GALLO: Mr. Hahn, do you recall on February the 1st, 1994, us talking on the phone and you requesting to have a meeting with me and Mr. Opperlee?

MR. HAHN: Yes.

MR. GALLO: Do you recall that your wife got on the extension line and told me that Keith's got it, that he

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MR. GALLO: (cont'd) said he was going to kill your grandchildren?

MR. HAHN: Yes.

MR. GALLO: Okay. Also, do you recall that on 2/2/1994 that me and you and Mr. Opperlee had a meeting in a restaurant?

MR. HAHN: Yes.

MR. GALLO: And during that meeting that you stated to me that the client was in possession of a firearm three times and had a bow and

arrow gun once? Do you remember . . .

MR. HAHN: I remember my son telling me that.

MR. GALLO: Do you remember indicating that the client also - - you told me he had been drinking on numerous occasions?

MR. HAHN: Yes.

MR. GALLO: And with regards to your statement, did you voluntarily come into the office - - into the Scranton office? Were you brought in, or did you come in . . .

MR. HAHN: I came in voluntarily.

MR. GALLO: Okay. And did you voluntarily sign this statement?

MR. HAHN: Yes.

MR. GALLO: And basically the things in this statement are true and correct?

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MR. HAHN: Yes.

MR. GALLO: That's all I have. I'd like to enter it into evidence.

HEARING EXAMINER ENGLE: Do you want to show the witness this paper?

MR. WESTERFIELD: Mr. Hahn, I'll show you another piece of

paper that has a signature. Is that your signature on the bottom?

MR. HAHN: Yes.

MR. WESTERFIELD: And is that statement signed in front of Notary Mary . . .

MR. HAHN: Yes.

MR. WESTERFIELD: Mary Lou H-o - - I have a hard time making that out.

HEARING EXAMINER ENGLE: Does it have a notary seal, Mr. Westerfield?

MR. WESTERFIELD: Yes, it does, Your Honor.

HEARING EXAMINER ENGLE: We'll accept it.

MR. WESTERFIELD: Did you make that statement and make it in front of the notary and swear to it?

MR. HAHN: Yes.

MR. WESTERFIELD: Your Honor, I'll move this - - this is an Affidavit dated March 29, 1994, and I'd move this Affidavit into evidence.

HEARING EXAMINER ENGLE: The document will be

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HEARING EXAMINER ENGLE: (cont'd) marked as D-1.

MR. GALLO: I'd like to address a couple of things in here if you don't mind. You say you were coerced into making a statement and signing a statement. A little while ago you testified that you signed this statement of your own free will. Which is correct? Did you sign it of your own free will, or did somebody make you sign it?

MR. HAHN: No. I don't know if that's the right word. I . . .

MR. GALLO: Well, this is your statement, sir, and it is . . .

MR. HAHN: Yeah, well . . .

MR. GALLO: Did somebody else make these words up for you?

MR. HAHN: No. I feel we were both taken advantage of. We were lied to.

MR. GALLO: Okay. As far as this gun in the pocket, is it not true that Mr. Opperlee told me that Mr. Scott had a .22 caliber pistol which you had in a bag, and that Mr. Scott had it in his pocket, but he could not see it? But since he was a gun expert and a licensed gun dealer, he knew the outshape of the gun and told me there was a gun in the pocket?

MR. HAHN: Yes.

MR. GALLO: Okay. We never charged Mr. Scott with having a gun in his pocket, did we? Do you know if we

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MR. GALLO: (cont'd) did?

MR. HAHN: [No audible reply.]

MR. GALLO: And the record will show we never charged him of this gun in his pocket because we had no proof of that. As far as me wanting him out of the street, about the gun in his pocket - - do you want me to say that he had a gun in his pocket?

MR. WESTERFIELD: Well, you told . . .

HEARING EXAMINER ENGLE: Well, wait a minute, gentlemen. Wait a minute. Let's have a little order here. Mr. Gallo, you can ask questions, but let's shorten them up a little bit. He'll get lost in the question.

MR. GALLO: Okay. I have no further questions.

HEARING EXAMINER ENGLE: Any questions of the witness on the signing of that document, counsel?

MR. WESTERFIELD: Mr. Hahn, did Mr. Gallo encourage you to make statements that Mr. Scott had threatened you or other members

of your family?

MR. HAHN: Yes, but it was hearsay. I told him it wasn't made directly of me.

MR. WESTERFIELD: These are the things that your wife had told you about that you now say you don't believe to be true?

MR. HAHN: [No audible reply.]

MR. WESTERFIELD: I have no questions, Your Honor.

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MR. GALLO: I have just one further question. You say I was trying to make you say these things? Is that what you're trying to tell us?

MR. HAHN: [No audible reply.]

MR. GALLO: Well, did you tell me these things, and I asked you if it happened to you personally?

MR. HAHN: The only thing - - you told my son to say he saw the handle of the gun sticking out to make it better, and he said he wouldn't lie.

MR. GALLO: Okay. No further questions.

HEARING EXAMINER ENGLE: Any further questions for the witness? Okay. Now, well, one of the affidavits, the S-1 Affidavit,

Mr. Hahn was on the list to be called with regard to condition 5b, count A. Right, Mr. Gallo?

MR. GALLO: That's correct.

HEARING EXAMINER ENGLE: And you were going to also, as I understand it, recall him to testify to special condition 7?

MR. GALLO: Yes, sir.

HEARING EXAMINER ENGLE: Does everyone have the Hearing Notice in front of them? I want to indicate that - - separate those counts in condition 7. The first one, on or about September 2, '93, will be count A, and on January 18, 1994, will be count B. Now, Mr. Hahn was - - your offer earlier was that Mr. Hahn was going to be called to testify with regard

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HEARING EXAMINER ENGLE: (cont'd) to one of these two?

MR. GALLO: Yes, sir.

HEARING EXAMINER ENGLE: Which one?

MR. GALLO: Yeah, on the consumed clear malt alcoholic beverages.

HEARING EXAMINER ENGLE: So that would have been

condition 7a?

MR. GALLO: 7a, sir.

HEARING EXAMINER ENGLE: And is that dealt with in this S-1 Affidavit?

MR. GALLO: Yes, it is, sir.

HEARING EXAMINER ENGLE: Do you have any further questions of this witness? Is there any . . .

(TAPE TWO)

HEARING EXAMINER ENGLE: Mr. Gallo, do you have any other questions of Witness Hahn or any other documents before we excuse him?

MR. GALLO: No. I have no other questions, but I would like to submit into evidence a copy of the Record of Interview that's in my field book dated 2/1/91 which indicates that I spoke to Mr. Hahn and that Mrs. Hahn got on the phone and stated that client had said he would kill her grandchildren.

MR. WESTERFIELD: Objection, Your Honor. That's hearsay.

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HEARING EXAMINER ENGLE: Sustained. Anything further,

Mr. Gallo?

MR. GALLO: I would like to enter the same thing. I would like to enter in a Record of Interview in my field book indicating that I spoke to Mr. Opperlee and Mr. Hahn on 2/2/94 . . .

MR. WESTERFIELD: Your Honor, I object. You're the fact-finder as well as the evidence ruler, and reading these things to you and then having objection sustained is - - I understand that you'll try to segregate the inadmissible evidence out. But giving the witness the opportunity to read them and then having them ruled inadmissible is not quite kosher.

HEARING EXAMINER ENGLE: We'll try to be as equitable as we can about this matter, Mr. Westerfield. Now, are you going to read a statement, Mr. Gallo, where someone told you something?

MR. GALLO: Yes, sir.

HEARING EXAMINER ENGLE: Counsel's objection is sustained. Mr. Hahn, you may be excused. Let's go off the record momentarily.

(OFF THE RECORD)

HEARING EXAMINER ENGLE: We're back on the record.

Mr. Westerfield has indicated that Mr. Scott is going to testify with regard to condition 5b, count A.

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MR. WESTERFIELD: You have seen S-1, the Affidavit, in which Mr. Hahn made a statement that on September 4 of 1993 he witnessed you firing a .22 Magnum revolver in his backyard. Do you see that paragraph?

MR. SCOTT: Yeah.

MR. WESTERFIELD: The weapon belonged to Mr. Hahn and he says was used by Keith Scott without permission?

MR. SCOTT: Right.

MR. WESTERFIELD: Tell the Judge what happened on that day with this .22 Magnum revolver.

MR. SCOTT: Everyone was target practicing out in the backyard.

HEARING EXAMINER ENGLE: Pardon me. Who is everyone, Mr. Scott?

MR. SCOTT: Well, several people - - Eric - - friends - - I don't know the names of those target practicing . . .

MR. WESTERFIELD: And this is the backyard of?

MR. SCOTT: Eric's residence. And I was handed the pistol and took several shots with it at a target hanging from a tree.

MR. WESTERFIELD: After you took the shots at the target, what did you do with the pistol?

MR. SCOTT: I gave it back to him. I made sure it was cleared. And he took it and made sure there was no bullets

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MR. SCOTT: (cont'd) and put it away.

MR. WESTERFIELD: Who handed it to you?

MR. SCOTT: Eric did. Eric Hahn.

MR. WESTERFIELD: And Eric was aware that you were on parole at that time?

MR. SCOTT: Yes, sir.

MR. WESTERFIELD: I have nothing else on that charge.

HEARING EXAMINER ENGLE: Questions, Mr. Gallo, for Mr. Scott?

MR. GALLO: Yes. Mr. Scott, when I came to your house when you were released from prison, did I explain to you the conditions governing parole, do you recall?

MR. SCOTT: Yes, sir, you did.

MR. GALLO: Okay. Do you recall when I did my talk to you about condition 5b, refrain from owning or possessing a firearm or any other weapon?

MR. SCOTT: Yes, sir, I do.

MR. GALLO: Okay. So then when you took that target practice you realized that you were in violation of your parole?

MR. SCOTT: Yes, sir. I just pled guilty to having that .22 Magnum in my possession.

MR. GALLO: No further questions.

MR. WESTERFIELD: For how long did you have the

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MR. WESTERFIELD: (cont'd) handgun in your possession?

MR. SCOTT: Three shots at the target (INAUDIBLE).

MR. WESTERFIELD: I have nothing else, Your Honor.

HEARING EXAMINER ENGLE: One clarification on your testimony, Mr. Scott. Did you have knowledge at the time to whom the pistol belonged?

MR. SCOTT: Yes, sir.

HEARING EXAMINER ENGLE: And what was your understanding as to the ownership of the weapon? Who owned it?

MR. SCOTT: Eric Hahn.

HEARING EXAMINER ENGLE: Eric Hahn. Okay. Now, on the day in question when "everyone was target practicing," you, obviously, have professed that Mr. Eric Hahn was present. Who else was present? Do you recall?

MR. SCOTT: Friends. No, I don't.

HEARING EXAMINER ENGLE: Do you recall how many others may have been present?

MR. SCOTT: Maybe two or three others. It was at a pool party. People were - - had - - after the party left, there was only a couple people left. And I don't remember. . .

HEARING EXAMINER ENGLE: So that you do remember though that it. . .

MR. SCOTT: I remember that I fired the weapon.

HEARING EXAMINER ENGLE: That's not the question, Mr. Scott. The question is besides yourself and Mr. Eric Hahn,

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HEARING EXAMINER ENGLE: (cont'd) do you recall anyone else that was there? You said you did not.

MR. SCOTT: No.

HEARING EXAMINER ENGLE: And then I asked you about how many others were present?

MR. SCOTT: I don't remember.

HEARING EXAMINER ENGLE: Was there anyone present in addition to you and Mr. Hahn?

MR. SCOTT: Yes.

HEARING EXAMINER ENGLE: Did you see Mr. Hahn target practicing with the gun?

MR. SCOTT: Yes.

HEARING EXAMINER ENGLE: Did you see anyone else shoot the gun?

MR. SCOTT: Yes, but I don't know the name of the person. I don't recall.

HEARING EXAMINER ENGLE: I understand that. So then there was at least one other person present?

MR. SCOTT: Yes, sir.

HEARING EXAMINER ENGLE: Now, other than Mr. Hahn and other than the second person that you saw shooting at the target, do you recall having seen anyone else target shooting?

MR. SCOTT: No. No. I don't recall.

HEARING EXAMINER ENGLE: Okay. Now, when someone handed you the gun. . .

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MR. SCOTT: No, Eric.

HEARING EXAMINER ENGLE: Mr. Hahn handed you the gun, okay, and you fired at the target two or three times according to your testimony. Right. Now, when you were finished, to whom did you return the gun?

MR. SCOTT: Eric.

HEARING EXAMINER ENGLE: Okay. Any other questions?

MR. WESTERFIELD: No, sir.

MR. GALLO: I just have one other question. Was Mrs. Hahn there?

MR. SCOTT: I don't recall where she was.

MR. GALLO: Okay.

HEARING EXAMINER ENGLE: Okay, gentlemen. Now,

having concluded with the exhibits and testimony on condition 5b, count A, can we now move to 5b, count B?

MR. GALLO: Yes.

HEARING EXAMINER ENGLE: Do you have a witness you wish to call?

MR. GALLO: Yes, sir.

HEARING EXAMINER ENGLE: Off the record till the witness is in the room.

(OFF THE RECORD)

HEARING EXAMINER ENGLE: Let the record show that the witness has entered the hearing room, and according to the

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HEARING EXAMINER ENGLE: (cont'd) witness list, this is Ray Opperlee?

MR. OPPERLEE: Opperlee.

HEARING EXAMINER ENGLE: Opperlee. Would you spell your last name please for the record?

MR. OPPERLEE: O-p-p-e-r-l-e-e.

HEARING EXAMINER ENGLE: Okay. You may remain

seated, Mr. Opperlee. Would you raise your right hand please? Do you swear any testimony you give at this hearing to be the truth, the whole truth, and nothing but the truth so help you?

MR. OPPERLEE: Yes.

HEARING EXAMINER ENGLE: Thank you. Mr. Opperlee, I would like to have your address please?

MR. OPPERLEE: Box 171 . . .

HEARING EXAMINER ENGLE: Box 171. . .

MR. OPPERLEE: Gilbert.

HEARING EXAMINER ENGLE: Spell it please.

MR. OPPERLEE: G-i-l-b-e-r-t.

HEARING EXAMINER ENGLE: Pennsylvania?

MR. OPPERLEE: Right. 18331.

HEARING EXAMINER ENGLE: Thanks. Your witness, Mr. Gallo.

MR. GALLO: Mr. Opperlee, are you the employer of or were you the employer of Mr. Scott?

MR. OPPERLEE: Yes.

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MR. GALLO: Are you also the son of Dot Hahn who is the wife of Eric Hahn?

MR. OPPERLEE: Yes.

MR. GALLO: Do you recall on 2/2/1994 meeting with me and Mr. Hahn in a restaurant on 15?

MR. OPPERLEE: Yes.

MR. GALLO: Do you recall making statements to me there, and I advised you that you should come to our office on 2/4/1994 and give a formal statement, sir — a statement that could be typed and formalized?

MR. OPPERLEE: Uh-huh. Yes.

MR. GALLO: And did anybody force you to come to our office?

MR. OPPERLEE: No, nobody handcuffed me and took me there. No.

MR. GALLO: Were you driven there, or did you come on your own?

MR. OPPERLEE: I came on my own.

MR. GALLO: Okay. Who else was with you when you came?

MR. OPPERLEE: Mr. Hahn.

MR. GALLO: And who else?

MR. OPPERLEE: My wife.

MR. GALLO: And your children?

MR. OPPERLEE: And children.

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MR. GALLO: Were you armed at the time?

MR. OPPERLEE: Yes, I was.

MR. GALLO: Did you give me a reason for being armed?

MR. OPPERLEE: I'm not sure exactly.

MR. GALLO: Did you not tell me that you were . . .

MR. WESTERFIELD: Objection. He's leading, Your Honor.

HEARING EXAMINER ENGLE: Sustained.

MR. GALLO: Okay. So when you came in our office, you were interviewed. Is that correct? By myself and Supervisor Pat Wynn?

MR. OPPERLEE: Correct.

MR. GALLO: As a result of that interview, did you give a statement to one Doris A. Baker?

MR. OPPERLEE: Yes.

MR. GALLO: Okay. And did you sign that statement?

MR. OPPERLEE: Yes, I did.

MR. GALLO: Was that statement true and correct?

MR. OPPERLEE: Yeah. The statement is true and correct, but I would like to explain it.

MR. GALLO: Well . . .

HEARING EXAMINER ENGLE: Your witness.

MR. GALLO: No. You don't have to explain it.

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MR. GALLO: (cont'd) Basically, I would like to ask if the witness would review the statement to make sure we're talking about the exact same statement . . .

MR. WESTERFIELD: Your Honor, I object to that procedure. He should ask him direct questions and get answers unless the witness is refusing to answer.

HEARING EXAMINER ENGLE: (INAUDIBLE) . . .

MR. OPPERLEE: Excuse me.

HEARING EXAMINER ENGLE: Just a second now, Mr. Opperlee.

MR. GALLO: Mr. Opperlee, is it true that in your statement that you said that . . .

MR. WESTERFIELD: Objection, Your Honor, leading. It's got to be leading the way he's asking these questions.

HEARING EXAMINER ENGLE: Can you suggest a way for him to ask it that it's not, Mr. Westerfield?

MR. WESTERFIELD: Well, I'd suggest that he ask him whether a particular event happened. Did anything happen on such and such a date?

HEARING EXAMINER ENGLE: Thank you. Go ahead, Mr. Gallo.

MR. GALLO: Did Mr. Scott in your presence threaten one of your employees, Gerald Thomas?

MR. OPPERLEE: Excuse me, but if I'm not going to be given time to say what I have to say, I am done testifying.

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MR. GALLO: Do you wish to make a statement?

HEARING EXAMINER ENGLE: Do you want to confer with your witness?

MR. GALLO: Yeah.

MR. OPPERLEE: No. I will say right now you don't have to

shut your recorder off.

HEARING EXAMINER ENGLE: Just a second, Mr. Opperlee.

(OFF THE RECORD)

HEARING EXAMINER ENGLE: We're back on the record. Where are we, gentlemen?

MR. GALLO: Yes. I have conferred with my witness outside the room, and my witness indicates he would like to make a statement, and I think it would be proper for him to make this statement.

HEARING EXAMINER ENGLE: All right. Go ahead, Mr. Opperlee.

MR. OPPERLEE: Okay. The charges that were made at the office — on what date was that?

MR. GALLO: February the 4th, 1994.

MR. OPPERLEE: They were made by me, and they were made under a lot of stress. Now, that position that I was put in at the time was very hard. Keith was working for me, and he was dating my mother. And they were supposed to be getting divorced and getting married and so on and so forth. At the

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MR. OPPERLEE: (cont'd) same time, right up until this day, every time my mother and father were together, they were talking about getting back together. They were constantly together when we were at work. She was telling Keith that she would want to be with him. She was telling my father she wants to be with him. Okay. In fact, we've had dozens of meetings, the three of us together, Eric Hahn, Dorothy Hahn, and myself, where she wanted out of the situation with Mr. Scott. But she told me every day on a daily basis that he was going to harm the family. There would be no survivors left if she tried breaking up with him. This was drilled into my head daily by Mrs. Hahn prior to me making these charges, and I would like that to be clear.

MR. GALLO: Now, I'd like to ask you a question. On the statement that you made on February the 4th, 1994, are these charges true and correct?

MR. WESTERFIELD: Objection. The statement's not in evidence so . . .

HEARING EXAMINER ENGLE: The witness is here, Mr. Gallo, so let's ask the gentleman specific questions.

MR. GALLO: Mr. Opperlee, were you present when Keith Scott threatened Gerald Thomas?

MR. OPPERLEE: Yes.

MR. GALLO: Would you in your own words describe the situation — what happened?

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MR. OPPERLEE: Now, in my own words — no, I can't.

MR. GALLO: Did Mr. Scott say anything to Mr. — to Gerald Thomas?

MR. OPPERLEE: Yes, he did.

MR. GALLO: What did he say?

MR. OPPERLEE: He was yelling at Mr. Thomas very loudly. They were having a major disagreement.

MR. GALLO: Do you remember his words?

MR. OPPERLEE: I guess if I'd read them off the statement I could remember the words.

HEARING EXAMINER ENGLE: Refresh the witness's recollection.

MR. OPPERLEE: There's nothing on there.

MR. GALLO: Please look at the — (INAUDIBLE) . . .

MR. WESTERFIELD: You're giving him the wrong statement.

MR. GALLO: Oh, I'm sorry. Very good. Thank you. [Pause] Yes. Now, do you recall what the words were Mr. Scott used after refreshing . . .

MR. OPPERLEE: I'm reluctant to answer these questions.

MR. GALLO: Okay. When Mr. Scott was having this argument with Gerald Thomas, did you observe anything unusual about Mr. Scott's body? Did he have anything unusual on him or

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MR. GALLO: (cont'd) anything like that?

MR. WESTERFIELD: You may refer to your statement if you wish to refresh your memory.

MR. OPPERLEE: He had two hammers with him.

MR. GALLO: Okay. And these two hammers, were they attached to his body in any way?

MR. OPPERLEE: It's unclear.

MR. GALLO: It's unclear. Okay. You're referring to your statement?

MR. OPPERLEE: Yes.

MR. GALLO: Is it not clear in your statement there? Could you read that paragraph (INAUDIBLE)?

MR. OPPERLEE: Yes.

MR. GALLO: What does it say here?

MR. OPPERLEE: It is clear in the statement.

MR. GALLO: And what does it say?

MR. OPPERLEE: It said he had two hammers.

MR. GALLO: Go on. What else does it say? If not, I'll instruct you

. . .

MR. WESTERFIELD: Your Honor, I object to him prompting the witness to read the statement.

MR. GALLO: Well, he's read part of the statement — part of the sentence. I'm just asking him to finish the sentence.

MR. WESTERFIELD: Yeah. I should have objected

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MR. WESTERFIELD: (cont'd) earlier.

MR. GALLO: But you didn't, and the sentence should be allowed to be finished.

MR. WESTERFIELD: No, it shouldn't be allowed to be. You have the right — Your Honor, if I may, I believe that Mr. Gallo has the right to ask the witness to read the statement to refresh his recollection, and then ask him the question again. If the witness says he still can't add to it, then that's the end of that exercise.

HEARING EXAMINER ENGLE: And I plainly agree with Mr. Westerfield.

MR. GALLO: But there was no objection at that time.

HEARING EXAMINER ENGLE: Other questions from this point, Mr. Gallo.

Mr. GALLO: Mr. Opperlee, do you own a 10mm handgun?

MR. OPPERLEE: Yes.

MR. GALLO: What type of gun is that? What is the make of it?

MR. OPPERLEE: Glock.

MR. GALLO: A Glock. Have you ever taken this gun on the job site with you?

MR. OPPERLEE: Yes, I have.

MR. GALLO: Have you ever seen Mr. Scott handle

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MR. GALLO: (cont'd) this gun and fire this gun?

MR. OPPERLEE: That's a two-part question.

MR. GALLO: Okay. Have you ever seen Mr. Scott handle the gun?

MR. OPPERLEE: Yes, he handled the gun.

MR. GALLO: Okay. Have you ever seen him fire the weapon?

MR. OPPERLEE: I was firing my weapon at Whiting (ph), my range, while he was present, and, yes, he fired the weapon one time.

MR. GALLO: Okay. We were on 5b. Is that correct, sir?

HEARING EXAMINER ENGLE: 5b.

MR. GALLO: That's all I have of questions as to 5b.

HEARING EXAMINER ENGLE: Okay. Let's stop there and give Mr. Westerfield an opportunity.

MR. WESTERFIELD: Mr. Opperlee, I take it that the — one of the charges here is that during September 1993 Mr. Scott was in possession of a 10mm Glock, G-l-o-c-k, handgun. And the extent of your testimony on that issue is that you were target practicing, and Mr. Scott took a shot with that gun and then gave it back to you?

MR. OPPERLEE: Yes.

MR. WESTERFIELD: And is that what you were

MR. WESTERFIELD: (cont'd) referring to when you said that Mr. Scott had handled . . .

MR. OPPERLEE: Uh-huh.

MR. WESTERFIELD: . . . that particular handgun? Who else was present when that happened?

MR. OPPERLEE: I believe Mrs. Hahn.

MR. WESTERFIELD: But that was at a target shooting area on your own property?

MR. OPPERLEE: It was on the property of my parents. It was a backstop that I had made and shot at over the years.

MR. WESTERFIELD: And to your knowledge that was the entire extent of Mr. Scott's contact with that 10mm Glock handgun?

MR. OPPERLEE: I would say to the best of my knowledge.

MR. WESTERFIELD: All right. I have no other questions.

MR. GALLO: I have no questions.

HEARING EXAMINER ENGLE: Fine. Are we finished, gentlemen? Mr. Westerfield, do you need to call any witnesses or have anyone testify concerning 5b, B?

MR. WESTERFIELD: No, Your Honor.

HEARING EXAMINER ENGLE: Okay. Now, Mr. Gallo, do I understand Mr. Opperlee is a — am I pronouncing that right?

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MR. OPPERLEE: Opperlee.

HEARING EXAMINER ENGLE: Mr. Opperlee is a witness with regard to another allegation?

MR. GALLO: Yes, sir. Number 7b.

HEARING EXAMINER ENGLE: 7b?

MR. GALLO: Yes, sir.

HEARING EXAMINER ENGLE: Okay. Let's find out what other testimony is here then, and we'll go to 7b next.

MR. GALLO: Mr. Opperlee, on or about 1/18/94, did you see Mr. Scott consume Southern Comfort alcoholic beverages?

MR. OPPERLEE: Yes.

MR. GALLO: And where did this take place?

MR. OPPERLEE: I believe on the property of Ms. Dermis's (ph) home.

MR. GALLO: Okay. No further questions.

MR. WESTERFIELD: You saw him drink Southern Comfort?

MR. OPPERLEE: Yes.

MR. WESTERFIELD: Out of a bottle?

MR. OPPERLEE: Yes.

MR. WESTERFIELD: Who handed him the bottle, or where did he get the bottle from?

MR. OPPERLEE: I can't recall.

MR. WESTERFIELD: Were people standing around passing a bottle around?

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MR. OPPERLEE: (INAUDIBLE) witness for or against him? I don't understand what I'm saying here.

HEARING EXAMINER ENGLE: Well, what you need to do is not choose sides, Mr. Opperlee. This is to determine the truth of the matter. My best advice to you is such when you're asked the question you give the most truthful — you give a truthful answer. If you do not recall, of course, you do not recall. Otherwise, I expect to hear the truth. You're under oath.

MR. OPPERLEE: I realize that.

HEARING EXAMINER ENGLE: Mr. Westerfield?

MR. WESTERFIELD: I'll withdraw, Your Honor.

HEARING EXAMINER ENGLE: Any other questions, gentlemen, for Mr. Opperlee?

MR. GALLO: I have no other questions.

HEARING EXAMINER ENGLE: Now, is Mr. Opperlee a witness with regard to any other charges, Mr. Gallo? He's not on my list if he is, but I thought I'd ask.

MR. GALLO: No, he is not.

HEARING EXAMINER ENGLE: Okay. Then we'll thank Mr. Opperlee for his testimony and excuse him from the stand. Thank you, Mr. Opperlee. We'll go off the record momentarily. (OFF THE RECORD)

HEARING EXAMINER ENGLE: We're back on the record.

MR. WESTERFIELD: Your Honor, may I have Mr. Scott

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MR. WESTERFIELD: (cont'd) testify briefly on 7b, and then that will conclude my evidence on that charge?

HEARING EXAMINER ENGLE: Fine. Mr. Scott?

MR. SCOTT: I deny the allegation that on 1/18/94 I consumed Southern Comfort alcoholic beverages.

MR. WESTERFIELD: Do you have any idea why Mr. Opperlee would say that?

MR. SCOTT: Only what I can assume, and it's over him being distressed of my mother — his mother and myself dating and him making the statements that if things didn't go the way he wanted to, which was for his mother and me to stop dating, that he would do something to fix it so that it worked out that way. And I'm not saying that — I don't know why he would say this other than I'm just imagining. That's what I took his statement to mean when he says if the relationship doesn't stop, he would do something to have me put back in jail.

MR. WESTERFIELD: No other questions.

MR. GALLO: I have one question. The charge is on or about 1/18/94. Is it possible you drank the Southern Comfort on another day?

MR. SCOTT: No, it's not. I never consumed any alcoholic beverages per se. The only alcohol I consumed since my release has

been a prescription cough medicine. I had that checked out through the pharmacy. It was a prescription, and

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MR. SCOTT: (cont'd) when you were — asked me about my one urine, I did, in fact, have someone go to the pharmacy and find out from him if there was alcohol in that cough medicine. And I think I've already told you I consumed alcohol on two occasions. I was given two bottles of that. I've already admitted that I consumed alcohol in that cough medicine.

MR. GALLO: No further questions.

MR. SCOTT: I would like to state — can I say something else?

HEARING EXAMINER ENGLE: You better check with your attorney.

MR. SCOTT: It's about alcohol.

(OFF THE RECORD)

HEARING EXAMINER ENGLE: We're back on the record.

MR. SCOTT: I requested on several occasions to Mr. Gallo that if there is any question of me drinking alcohol that I be placed on Antabuse which is a medication that alcoholics take, and it makes

them violently ill if they do take medicine.

HEARING EXAMINER ENGLE: We know what Antabuse does.

MR. SCOTT: I requested that on several occasions and was told that it's not necessary and I don't believe in it. But, you know, that was — you know, if they had fears that I was going to be drinking, I willingly wanted to be placed on

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MR. SCOTT: (cont'd) this medicine. That was a condition that I set for myself.

HEARING EXAMINER ENGLE: Okay. Gentlemen, let's move now to 5b, count C. Do you have a witness?

MR. GALLO: Yes, I have.

HEARING EXAMINER ENGLE: We'll go off the record pending arrival of the witness.

(OFF THE RECORD)

HEARING EXAMINER ENGLE: We're back on the record. The witness is in the hearing room. Sir, would you state your name for the record please?

MR. MUNDRO: Larry Mundro, M-u-n-d-r-o, Parole Supervisor, Scranton District Office.

HEARING EXAMINER ENGLE: You may remain seated, Mr. Mundro. Would you raise your right hand please? Mr. Mundro, do you swear the testimony you give at this hearing to be the truth, the whole truth, and nothing but the truth so help you?

MR. MUNDRO: I do.

HEARING EXAMINER ENGLE: Thank you. Your witness, Mr. Gallo.

MR. GALLO: Mr. Mundro, did you participate in the arrest and. . .

HEARING EXAMINER ENGLE: Counsel. . .

MR. WESTERFIELD: Your Honor, this testimony is

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MR. WESTERFIELD: (cont'd) going to - - preliminary parts of it - - be about a search which Mr. Mundro conducted at the residence where Mr. Scott was staying. And there is a question about the search, how they got to search the building, and I'd like to raise that. And how should we do that? At what point in the proceedings?

HEARING EXAMINER ENGLE: Well, let's do it now, Mr.

Westerfield.

MR. WESTERFIELD: Your Honor, if I can - - I believe Mr. Mundro's testimony will be that he went to the residence where Mr. Scott was staying and that he had taken a key from Mr. Scott and gave the key to Mrs. Hahn and told her to open the door; and that after some urging, she did that, and the agents then went in and found things that shouldn't have been there according to the agents. Mrs. Hahn had no authority to open the door to the house.

HEARING EXAMINER ENGLE: Who owned the house?

MR. SCOTT: My mother.

MR. WESTERFIELD: (INAUDIBLE)house. Mr. and Mrs. McDaniel owned the house. That's Mr. Scott's mother and father.

HEARING EXAMINER ENGLE: And so you're suggesting that Mr. Mundro was there. . .

MR. WESTERFIELD: Yes.

HEARING EXAMINER ENGLE: . . . with Mr. Scott?

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MR. WESTERFIELD: No, no, with Mrs. Hahn.

HEARING EXAMINER ENGLE: Mrs. Hahn.

MR. WESTERFIELD: And a key that had been taken from Mr. Scott at the time of Mr. Scott's arrest very shortly before that - - about a half hour. . .

HEARING EXAMINER ENGLE: Oh, so Mr. Mundro brought the key with him?

MR. WESTERFIELD: Correct. Then gave the key to Mrs. Hahn and told her to open the house. She's here to testify about that exchange, and ultimately she relented and opened the house, and the agents then went in.

HEARING EXAMINER ENGLE: Are you suggesting something here, Mr. Westerfield? I'm sure you can articulate it.

MR. WESTERFIELD: That there was no consent from anybody - - who had the right to consent to that search.

HEARING EXAMINER ENGLE: I thought you could. Well, you conducted the search, right, Mr. Mundro?

MR. MUNDRO: Yes, I did.

HEARING EXAMINER ENGLE: Okay. I'm going to hear arguments on the search issue at this point. You've heard what Mr. Westerfield is suggesting.

MR. MUNDRO: Yes. I'd like to point out that after securing the key from Mr. Scott, I asked Mrs. Hahn to accompany us to his approved residence.

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HEARING EXAMINER ENGLE: His meaning Mr. Scott?

MR. MUNDRO: Mr. Scott's approved residence which was a short distance - - five minute drive from the diner where he was arrested. She agreed to accompany us. She agreed to drive Mr. Scott's pickup truck from the diner. Mr. Scott did not want to leave his pickup truck at the diner. None of us were willing to drive the truck. She said she'd drive it. We followed her to the - - Mr. Scott's home. Upon arriving at the home, I gave Mrs. Hahn the key. She unlocked the kitchen door. As soon as we entered - - and prior to entering the home, I asked her if she would please call Mr. Scott's mother who was working at the time. She agreed to that. As soon as we entered the home, she called Mrs. Scott at her job, I assume.

HEARING EXAMINER ENGLE: Mrs. Scott?

MR. GALLO: This is Mrs. McDaniel.

MR. MUNDRO: Oh, I'm sorry.

HEARING EXAMINER ENGLE: Mrs. McDaniel who is Mr. Scott's mother and who is owner of the residence. . .

MR. MUNDRO: Yes.

HEARING EXAMINER ENGLE: . . . where the telephone's being used?

MR. MUNDRO: Correct. So after Mrs. Hahn made the telephone call, I instructed all of the agents to remain in the kitchen and await her arrival. When she arrived in the kitchen. . .

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HEARING EXAMINER ENGLE: Who is she?

MR. MUNDRO: That is Mr. Scott's mother. I explained to her that we were going to search Mr. Scott's room. I asked her where that room was. She hesitated to tell me where the room was. I said we are going to go upstairs, and we're going to search his room. We will find it if we need to at which point she escorted us upstairs and pointed out Mr. Scott's bedroom. I just want to make it clear that at no time was there any search of any kind until she arrived on the scene. And I did not want to ask Mr. Scott's mother to meet us at the residence for fear there was any contraband of any type in the home - - I did not want to

have any of that contraband removed prior to us arriving at the residence. So this is why I asked Mrs. Hahn to unlock the door, then call Mr. Scott's mother. And we awaited her arrival and then commenced our search after she arrived.

MR. WESTERFIELD: I don't think there's any testimony yet about anybody consenting to the search.

HEARING EXAMINER ENGLE: Go ahead, Mr. Westerfield.

MR. WESTERFIELD: And if there was consent, the alleged contraband was not found in the room that Agent Mundro has referred to.

HEARING EXAMINER ENGLE: Well, let's not get in

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HEARING EXAMINER ENGLE: (cont'd) there yet. I don't think we are in there yet. Mr. Mundro, would you explain for the benefit of this hearing record what your legal responsibilities are and what legal guidelines are established for you to conduct a search?

MR. MUNDRO: Yes. Any individual under the supervision of the Pennsylvania Board of Probation and Parole can have his residence searched by representatives of the Board with or without the

homeowner's permission if this is the parolee or probationer's approved residence. I was merely informing Mr. Scott's mother that we were going to search, and I asked her to please show us where his bedroom was. We also have the right to search any common living areas in the residence.

HEARING EXAMINER ENGLE: What was the purpose of the search, Mr. Mundro?

MR. MUNDRO: The purpose of the search was to attempt to locate any firearms that may have been in the home?

HEARING EXAMINER ENGLE: So you knew before you got there you were looking for - - when you say contraband, you mean firearms specifically?

MR. MUNDRO: Firearms specifically.

HEARING EXAMINER ENGLE: Mr. Westerfield?

MR. WESTERFIELD: I have no questions.

HEARING EXAMINER ENGLE: Off the record.

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HEARING EXAMINER ENGLE: We're back on the record. Mr. Westerfield, we're still on the issue of search. Do you have any

other comments before we decide?

MR. WESTERFIELD: Only that even if the agents have the right to search an approved residence of a probationary that they don't have the right to have someone other than an occupant of the house - - to require someone other than an occupant of the house to let them in as they did with Mrs. Hahn in this case. And by the time Mrs. McDaniel arrived, things were really over because they were already in the house. As Agent Mundro has quite clearly stated, he didn't ask for permission to search. He told her he was going to search and just asked where Mr. Scott's room was so technically he'd know where to start. So there was no - - I take it that he's not alleging that there was consent. He's saying that they were going to do it one way or the other and . . .

HEARING EXAMINER ENGLE: I think that's his position.

MR. WESTERFIELD: Yeah. And I think that they have to get consent, and they did not get consent.

HEARING EXAMINER ENGLE: The issue is on the record. My finding regarding this issue is that there were - - that the consent - - that the search (INAUDIBLE) was a bit unusual but within

requirements so established for consent by

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HEARING EXAMINER ENGLE: (cont'd) residences of parolees by parole agents and the Commonwealth. So let's go forward having resolved the issue of search. Your witness, Mr. Gallo.

MR. GALLO: Mr. Mundro, you did participate in the arrest and then the following search of Mr. Scott's approved residence. Is that correct?

MR. MUNDRO: Yes, I did. Yes.

MR. GALLO: Okay. When you searched the approved residence, did you search every room in the house?

MR. MUNDRO: No, I did not.

MR. GALLO: Okay. Which rooms were searched?

MR. MUNDRO: I searched a room which was adjacent to what I was told was Mr. Scott's bedroom. It contained two small sofas, and there was an ironing board in between the two sofas. There was also a television set at the far end of the room, and to your immediate right as you entered the room, there was a closet. And as you entered this bedroom - - this room, if you did not enter this room, if you made an

immediate left, you would enter Mr. Scott's bedroom.

MR. GALLO: Was there a door to his room?

MR. MUNDRO: Yes, there was.

MR. GALLO: Was the door locked?

MR. MUNDRO: No.

MR. GALLO: Was it open?

MR. MUNDRO: Yes, it was.

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MR. GALLO: Did anybody in the residence tell you what this room was used for?

MR. MUNDRO: No. At the time I began searching this particular room, Mr. Scott's mother had returned I believe at least to the kitchen, and I believe she may have been speaking with you at that time.

MR. GALLO: Would you tell us what, if anything, you found in his room?

MR. MUNDRO: Under the sofa which was on the left side of the room as you entered the door, I found - - let's see - - five guns one of which was a Mostberg (ph) .12 gauge pump shotgun, serial number

G, as in George, 878391. This particular shotgun was laying on the floor under the sofa, and it was in a shotgun case - - a zippered case. The other weapons one of which was a Glenfield .12 gauge bolt-action, serial number 71357747; also a Stevens .12 gauge shotgun with no serial number; a Harrington-Richardson .12 gauge single barrel shotgun, serial number 918060; and a Glenfield .22 caliber semiautomatic rifle, model 60, serial number 23506068 - - all of those guns, as I said, with the exception of the Mostberg .12 gauge pump, were wrapped in a white cloth, and there was tape around the white cloth. And then the rifles were also in plastic bags which were also taped. Those were on the floor under the sofa directly next to the .12 gauge which, as I said, was in the zippered case. Also, after I found these rifles,

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MR. MUNDRO: (cont'd) after searching the closet which was in the same room, I found the green camouflage-colored compound bow and three arrows.

MR. GALLO: These weapons - - you say they were under the couch?

MR. MUNDRO: Correct.

MR. GALLO: Were they concealed under the couch? Well, how was the couch? Was the couch against the wall?

MR. MUNDRO: Correct.

MR. GALLO: Were the guns at the far end against the wall, or were they in the front part of the couch?

MR. MUNDRO: They were in the front part and actually towards the - - if you're facing the sofa, the left end so then closer to the doorway.

MR. GALLO: These guns - - they were returned to your office?

MR. MUNDRO: Correct.

MR. GALLO: And we have the guns in our possession?

MR. MUNDRO: They're all in the evidence locker at the Santress (ph) Building.

MR. GALLO: Did you interview Mrs. McDaniels about these guns as to their ownership or to. . .

MR. MUNDRO: Yes.

MR. GALLO: . . . who had access to them?

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MR. MUNDRO: After uncovering all of the firearms, I

explained to her that given the fact they were in the residence and accessible in my opinion to Mr. Scott that we would be confiscating all of them. I explained to her that she would be given a receipt which would contain a description and a serial number if there was one available of each of the weapons. After advising her of that, she indicated that none of the guns belonged to her son and that they all belonged to her husband.

MR. GALLO: I have no further questions.

MR. WESTERFIELD: Was there any evidence that any of the guns had been recently fired?

MR. MUNDRO: I couldn't tell you if they were.

MR. WESTERFIELD: Did you look at them?

MR. MUNDRO: Yes.

MR. WESTERFIELD: Can you tell if a shotgun's been fired recently?

MR. MUNDRO: Yes. I didn't look down the barrels of the weapons. I just unpacked them (INAUDIBLE).

MR. WESTERFIELD: Did you check to see if they were loaded?

MR. MUNDRO: Correct. Yes. I worked the actions of all of

them to be sure there was no ammunition, and there was no ammunition in any of them.

MR. WESTERFIELD: Okay. Well, a single-shot

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MR. WESTERFIELD: (cont'd) shotgun, don't you kind of have to look down the barrel to see if there's anything in it?

MR. MUNDRO: Yeah. Well, just the breech. I didn't hold it up to the light to see if there was any powder in the barrel itself.

MR. WESTERFIELD: I take it that these were all long guns, no handguns?

MR. MUNDRO: Correct.

MR. WESTERFIELD: Did the four that were - - you said that four of them were wrapped in white cloth?

MR. MUNDRO: Correct.

MR. WESTERFIELD: And then taped?

MR. MUNDRO: Correct.

MR. WESTERFIELD: With what kind of material were they taped?

MR. MUNDRO: As I recall, I think it was electrical tape. I don't know if it was black.

MR. WESTERFIELD: And were they oiled - - appear to have been oiled before they were wrapped up in this white cloth?

MR. MUNDRO: They may have been, but they weren't oily when I removed them from the white cloth.

MR. WESTERFIELD: Did you find any ammunition?

MR. MUNDRO: No.

MR. WESTERFIELD: And the one shotgun you

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MR. WESTERFIELD: (cont'd) testified was in a zippered case like someone might use to carry a shotgun to and from hunting?

MR. MUNDRO: Correct.

MR. WESTERFIELD: Did you know where to look for these guns?

MR. MUNDRO: No.

MR. WESTERFIELD: Did the couch under which they were located - - was the area under the couch visible, or did the couch have a skirt or material around the sides of it?

MR. MUNDRO: I don't recall. It might have. I don't recall being able to see them when I entered the room, but as I testified earlier, they were very close to the front of the sofa - - probably eight

to ten inches, I'm just guessing, at the most maybe a foot, from the front of the sofa.

MR. WESTERFIELD: Had you been advised by someone that there were these shotguns and rifles in the house?

MR. MUNDRO: As speaking with Mr. Gallo prior to making the arrest of Mr. Scott, he indicated that there may be firearms in the home. I don't recall that we discussed specifically what types of firearms we might find, but we definitely did discuss the fact that there may be some in the home.

MR. WESTERFIELD: So you don't know the source of the information that there might be some firearms in the home?

MR. MUNDRO: I don't recall. We may have

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MR. MUNDRO: (cont'd) discussed that prior to the arrest.

MR. WESTERFIELD: No other questions.

HEARING EXAMINER ENGLE: Any other questions for this witness, Mr. Gallo, before . . .

MR. GALLO: I have no further questions.

HEARING EXAMINER ENGLE: Thank you, Mr. Mundro.

You may be excused. Mr. Mundro's not going to testify to anything else now, is he?

MR. GALLO: No, no.

HEARING EXAMINER ENGLE: You can stay in the hearing room if you want, Mr. Mundro. Okay. Now, let's see what is left here. Let's look to Mr. Westerfield and find out if Mr. Scott or any other witnesses he may wish to call. Do you have another witness?

MR. GALLO: I have an Agent Dunham that I would like to have testify. He'll be testifying to the fact that. . .

HEARING EXAMINER ENGLE: Concerning count C here, the guns in the house?

MR. GALLO: No. He's going to testify that Mr. Scott admitted to him that he was drinking (INAUDIBLE).

HEARING EXAMINER ENGLE: Oh, okay. No, let's do 5b, count C first. Now, Mr. Westerfield, do you have any witnesses you want to call regarding that, or does Mr. Scott want to make any statement?

MR. WESTERFIELD: Well, I would like to have Mr.

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MR. WESTERFIELD: (cont'd) Scott make a statement, but I'd like to have Mr. McDaniel testify about. . .

HEARING EXAMINER ENGLE: That would be fine.

MR. WESTERFIELD: Both on talking about 5b-c.

MR. GALLO: 5c?

MR. WESTERFIELD: Yeah. From the time you were paroled, were you aware that there were any firearms in the house in which you were living?

MR. SCOTT: No, I wasn't.

MR. WESTERFIELD: Do you know whose firearms those were?

MR. SCOTT: They were my dad's.

MR. WESTERFIELD: Your stepfather?

MR. SCOTT: Right.

MR. WESTERFIELD: From the time you were paroled, you said you weren't aware they were there so I guess you didn't use them if you weren't aware they were there?

MR. SCOTT: No. I'd like to say that when I went through my parole classes over in the academic building that I told my mom that dad would have to get rid of all the guns in order for me to come

home, and my mom said that she told him, that he took care of it. As a matter of fact, she said that he took the gun cabinet - - all the guns from the gun cabinet and changed it into a curio for holding beer steins. I had no - - I imagined that his guns were gone because that's where they were

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MR. SCOTT: (cont'd) always kept - - in the gun cabinet.

MR. WESTERFIELD: So prior to your going into prison originally some years ago, those firearms were kept in a cabinet with a glass front where you could see them?

MR. SCOTT: Yeah.

MR. WESTERFIELD: And when you went out on your parole, you saw that cabinet wasn't a gun cabinet anymore?

MR. SCOTT: No. It holds all those beer steins.

MR. GALLO: I have questions. Regarding the room the guns were found in, what is that room used for? What is the purpose of that room?

MR. SCOTT: It's my mother's private sitting area. I'm not allowed in the room. I have - - I don't even - - to my knowledge, I've never

seen my father in that room either.

MR. GALLO: How close is that to your room?

MR. SCOTT: It's the next room over from mine.

MR. GALLO: Do you have to pass that room to get to your room?

MR. SCOTT: No, you don't.

MR. GALLO: Is that door always locked or unlocked or. . .

MR. SCOTT: I never really pay much attention to it. I mean, to my knowledge, I know it's open because I see the ironing board there all the time. When I'd come home at night, my mom would be watching TV in there by herself.

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MR. GALLO: No further questions.

MR. WESTERFIELD: Should I have Mr. McDaniel testify now?

HEARING EXAMINER ENGLE: Let's go off the record. (OFF THE RECORD)

HEARING EXAMINER ENGLE: We're back on the record. The witness has entered the hearing room. Sir, I ask you to state your full name for the record please?

MR. MCDANIEL: John McDaniel.

HEARING EXAMINER ENGLE: Sir?

MR. MCDANIEL: John McDaniel.

HEARING EXAMINER ENGLE: Would you spell your last name please?

MR. MCDANIEL: M-c-D-a-n-i-e-l.

HEARING EXAMINER ENGLE: And your address, Mr. McDaniel?

MR. MCDANIEL: R.D. 1, Box 307A, Effort, Pennsylvania.

HEARING EXAMINER ENGLE: The town again please?

MR. MCDANIEL: Effort, E-f-f-o-r-t.

HEARING EXAMINER ENGLE: You may remain seated, Mr. McDaniel. Would you raise your right hand please? Mr. McDaniel, do you swear any testimony you give at this hearing to be the truth, the whole truth, and nothing but the truth so help you?

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MR. MCDANIEL: I will.

HEARING EXAMINER ENGLE: Thank you. Your witness, Mr. Westerfield.

MR. WESTERFIELD: Mr. McDaniel, you're Keith's stepfather?

MR. MCDANIEL: Yes.

MR. WESTERFIELD: And for how long have you been married to Mrs. McDaniel?

MR. MCDANIEL: 1978.

MR. WESTERFIELD: And how are you employed?

MR. MCDANIEL: Port Authority (INAUDIBLE).

MR. WESTERFIELD: What's your job with the Port Authority?

MR. MCDANIEL: Supervisor of the railroad.

MR. WESTERFIELD: Now, in addition to being married to Mr. Scott's mother, you resided from the time Mr. Scott was paroled until he was arrested for the parole violation in the same house with him?

MR. MCDANIEL: Yes.

MR. WESTERFIELD: And in addition to yourself and Mr. Scott, your wife, Mr. Scott's mother, lived in the house. Right? And there were just the three of you living in the house?

MR. MCDANIEL: Right.

MR. WESTERFIELD: Now, there's been - - you weren't

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MR. WESTERFIELD: (cont'd) in the room, but the last witness

testified to finding five long guns under a couch in a room in that house and also finding a bow and arrow-type bow in a closet and three arrows in the same closet. Do you know who owned any of those items?

MR. MCDANIEL: Yeah. They were mine.

MR. WESTERFIELD: The guns, according to the testimony, were - - one shotgun was in a zippered gun case, and the four other long guns were wrapped in a white cloth material and then taped. Do you agree that that's the way - - the condition they were in?

MR. MCDANIEL: Yes, in plastic bags.

MR. WESTERFIELD: And in plastic bags. Okay. Where or had you put those guns in - - well, let's take the guns first - - somewhere within the house?

MR. MCDANIEL: Yeah. I put them underneath the couch - - (INAUDIBLE) underneath the couch so I could get them out of there.

MR. WESTERFIELD: Okay. And was that a couch that one could look under when you came into the room?

MR. MCDANIEL: No.

MR. WESTERFIELD: Did it have material down to the floor?

MR. MCDANIEL: It was draped. It had a cover overtop of it. It was draped to the floor.

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MR. WESTERFIELD: Okay. Was Keith aware that those guns were in the house?

MR. MCDANIEL: No.

MR. WESTERFIELD: Was he aware that the bow was in the house?

MR. MCDANIEL: I don't know if he was or not. I didn't know a bow was a problem. I had the bow in my closet in there.

MR. WESTERFIELD: Where had the guns been stored when Keith last lived at the house?

MR. MCDANIEL: In the gun cabinet.

MR. WESTERFIELD: And had you taken them from the gun cabinet and converted that to some other use?

MR. MCDANIEL: Right. I changed it into a storage for beer steins. I collect beer steins.

MR. WESTERFIELD: Did you have some plans for these long guns within a short time after they were seized?

MR. MCDANIEL: Yeah. My brother was coming down from

New York. We were going on vacation together, and he was supposed to take them back with him because I understood they weren't supposed to be available to Keith. The only way I could get rid of them was give them away, and I didn't want to give them to anybody that I didn't know so my brother was going to take them for me.

MR. WESTERFIELD: You were aware that these

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MR. WESTERFIELD: (cont'd) firearms were supposed to be out of the house?

MR. MCDANIEL: Well, the way I understood it was supposed to be - - he wasn't supposed to have contact or be able to get to them so I didn't want to just throw them away. When I found out that he - - my wife told me that the guns - - we're not allowed - - you know, we weren't supposed to have guns, that's when I wrapped them up and got rid of them - - (INAUDIBLE) got rid of them.

MR. WESTERFIELD: And when was your brother due to pick them up? How long after they were seized?

MR. MCDANIEL: We were leaving February 28 or - - yeah, I believe February 28 for vacation.

MR. WESTERFIELD: Did someone at some point ask you whether your shotguns and rifles were still at your house?

MR. MCDANIEL: Yeah. Ray had asked me one time. He says . . .

MR. WESTERFIELD: Ray Opperlee?

MR. MCDANIEL: Right. "You didn't really get rid of your guns, did you?" because I had told Keith I just threw them away or got rid of them. And I says, "No, I got to - - you know, I'm going to get rid of them and give them to my brother." He knew they were in the house.

MR. WESTERFIELD: Okay. I have no other questions.

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MR. GALLO: Mr. McDaniel, you say your brother was going to come and take the guns on the 28th of February?

MR. MCDANIEL: When we got back from Mexico, yes.

MR. GALLO: And your stepson was released on September the 9th - - the 1st, 1994. That's how many months - - that's five months they'd been in your house that long?

MR. MCDANIEL: Yeah.

MR. GALLO: Would you describe the upstairs to us please?

MR. MCDANIEL: Okay. If you go up the steps and you make a right, that's the master bedroom. That's where me and my wife stay. If you turn to the left, there's a - - the first door on the left there is a - - where Keith's bedroom was. And if you went straight ahead, there was a small sitting room that my wife used.

MR. GALLO: Was this exclusively your wife's room? Were you allowed in there? Was anybody in the family allowed to go in there?

MR. MCDANIEL: My wife used it during the evening when it was time for me to go to bed so she could watch television.

MR. GALLO: Was Keith or you allowed in there? Was that. . .

MR. MCDANIEL: Oh, I was allowed in there. Yeah.

MR. GALLO: How about Keith? Was he allowed to go

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MR. GALLO:(cont'd) in there?

MR. MCDANIEL: He had no business in there.

MR. GALLO: But was there anything that said - - did anybody tell him he's not allowed in that room or anything like that?

MR. MCDANIEL: No.

MR. GALLO: Okay. I have no further questions.

MR. WESTERFIELD: Whether he was allowed to or not, was it a room that he went into? Did you ever see him in there?

MR. MCDANIEL: No, never. He had his own room. He had his own television. He had the downstairs. He had a larger television. And this was a room exclusively used by my wife to watch television because she didn't want to sit downstairs by herself.

MR. WESTERFIELD: Did that use of the room have anything to do with why you chose that as a place to hide these guns until you can get them out of the house?

MR. MCDANIEL: Well, I figured it was - - who would go in there, you know? Who would look underneath the couch?

MR. WESTERFIELD: Other than parole officers?

MR. MCDANIEL: Well, yeah.

MR. WESTERFIELD: Okay, Mr. McDaniel, thank you.

MR. GALLO: I have one more question. Were there periods of time when Keith would be at home alone with nobody

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MR. GALLO: (cont'd) there with him?

MR. MCDANIEL: He could. Not often.

MR. GALLO: But he would be alone?

MR. MCDANIEL: (INAUDIBLE).

MR. GALLO: And you didn't keep this door locked, did you? Was this door locked?

MR. MCDANIEL: No.

MR. GALLO: No further questions.

MR. WESTERFIELD: May I have one moment? [Pause] Was there any ammunition with these guns?

MR. MCDANIEL: No, none whatsoever.

MR. GALLO: I have a question. Do you have any ammunition in the house?

MR. MCDANIEL: No.

MR. WESTERFIELD: None at all?

MR. MCDANIEL: None at all. Nowhere.

MR. WESTERFIELD: Nothing else, Your Honor.

MR. GALLO: I have one more question. As far as the bow and arrow, there were arrows there. You had three arrows in the house. They were with the bow. Is that correct?

MR. MCDANIEL: Uh-huh. But I didn't know what condition they were in.

MR. GALLO: (INAUDIBLE).

HEARING EXAMINER ENGLE: Thank you, Mr. McDaniel, for your willingness to testify today. You may be excused.

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(OFF THE RECORD)

HEARING EXAMINER ENGLE: We're on the record.

MR. WESTERFIELD: Mr. Gallo, did you give Mr. Scott a urinalysis test of any kind while he was on parole?

MR. GALLO: Yes, I did.

MR. WESTERFIELD: And when was that?

HEARING EXAMINER ENGLE: Relevance, counsel?

MR. GALLO: I don't have a copy of the . . .

HEARING EXAMINER ENGLE: Just a second, Mr. Gallo. What's the relevance?

MR. WESTERFIELD: Consumption of alcohol.

HEARING EXAMINER ENGLE: Did you ever test Mr. Scott for the consumption of alcohol, Mr. Gallo?

MR. GALLO: No sir.

MR. WESTERFIELD: Okay. You never tested him for consumption of alcohol? The test was purely a drug screen?

MR. GALLO: It was a drug screen.

MR. WESTERFIELD: When you arrested him in February . . .

HEARING EXAMINER ENGLE: What are we talking about here, Mr. Westerfield? What condition?

MR. WESTERFIELD: 7a and b, Your Honor.

HEARING EXAMINER ENGLE: Well, generally 7a and b?

MR. WESTERFIELD: Yes, sir.

HEARING EXAMINER ENGLE: Well, we haven't heard

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HEARING EXAMINER ENGLE: (cont'd) what the State has to say on 7a. We have heard the State's witnesses on 7b.

MR. WESTERFIELD: Yeah. I was under the impression that the State's only evidence on 7a was Mr. Hahn's Affidavit, Your Honor.

HEARING EXAMINER ENGLE: Is that correct?

MR. GALLO: I have Mr. Hahn, but I also have a state agent that will testify that Mr. Scott admitted to him that he was drinking al ohol.

HEARING EXAMINER ENGLE: Well, let's call the state agent. We'll deal with 7a, and then we'll give you your opportunity to - - off the record.

(OFF THE RECORD)

HEARING EXAMINER ENGLE: We're back on the record. The fourth State's witness has entered the hearing room. Would you state your full name, sir, for the record please?

MR. DUNHAM: Loren Milo Dunham.

HEARING EXAMINER ENGLE: Would you spell your last name please, Mr. Dunham?

MR. DUNHAM: D-u-n-h-a-m.

HEARING EXAMINER ENGLE: And I understood Mr. Gallo to say you're an employee of the State Parole Board?

MR. DUNHAM: That's correct.

HEARING EXAMINER ENGLE: And you're what? A parole agent?

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MR. DUNHAM: I am a parole agent.

HEARING EXAMINER ENGLE: And your headquarters are?

MR. DUNHAM: Scranton District.

HEARING EXAMINER ENGLE: Mr. Dunham, you may remain seated. Would you raise your right hand please? Do you swear any testimony you give at this hearing to be the truth, the whole truth, and nothing but the truth so help you?

MR. DUNHAM: I do.

HEARING EXAMINER ENGLE: Thank you. Your witness, Mr. Gallo.

MR. GALLO: Mr. Dunham, on 2/4/1994, did you participate in the arrest of Keith Scott?

MR. DUNHAM: Yes, I did.

MR. GALLO: After Keith Scott was taken into custody, were you ordered to transport him to a Monroe County Prison?

MR. DUNHAM: I was assigned as a transport officer. Yes.

MR. GALLO: En route to Monroe County Prison, did Mr. Scott make any statements to you?

MR. WESTERFIELD: Your Honor . . .

MR. GALLO: I'm just asking him if he made a statement.

MR. WESTERFIELD: Yeah. I take it this is going

MR. WESTERFIELD: (cont'd) to be something incriminating, and since we're talking about Mr. Scott in custody and an agent of the State doing the testifying, could we do some questions about warnings and what Mr. Scott was warned before being asked questions?

HEARING EXAMINER ENGLE: I think Mr. Westerfield would like to know, Mr. Dunham, whether or not Mr. Scott was advised of his Miranda warnings?

MR. DUNHAM: He was not.

MR. WESTERFIELD: I'd object to any testimony about any statements by Mr. Scott after he was under arrest, Your Honor.

HEARING EXAMINER ENGLE: Mr. Dunham, what is your understanding of a parole agent's requirements regarding the Miranda warnings?

MR. DUNHAM: Miranda warnings is - - my understanding Miranda warnings is given in cases of criminal charges. We were not charging Mr. Scott criminally so it was not necessary.

HEARING EXAMINER ENGLE: Your objection's noted for the

record but overruled, counsel.

MR. WESTERFIELD: Thank you, Your Honor.

HEARING EXAMINER ENGLE: En route to where Mr. Dunham?

MR. DUNHAM: We were en route to the prison of

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MR. DUNHAM: (cont'd) Monroe County.

MR. GALLO: Mr. Dunham, did Mr. Scott make a statement to you while you were en route to Monroe County Prison?

MR. DUNHAM: He made a generalized statement to two agents, myself and a supervisor in the car, that he had been drinking while he was on parole.

MR. WESTERFIELD: Objection, Your Honor. That's irrelevant to any of the specific charges here.

HEARING EXAMINER ENGLE: You're — I assume — just a second, Mr. Gallo. Let me ask a question. I want this record to be clear. I assume that you're addressing the issue here of an alleged violation of condition 7a which on the Notice of Charges that Mr. Scott would have received says, "On or about September 2, 1993, you

consumed Zimbuck (ph) clear malt alcoholic beverages." Is that correct?

MR. GALLO: Correct.

HEARING EXAMINER ENGLE: Continue, Mr. Gallo.

MR. GALLO: Mr. Dunham, did Mr. Scott testify to approximately what time period that this was consumed — that alcohol was consumed?

MR. DUNHAM: I really don't recall.

MR. GALLO: No further questions.

HEARING EXAMINER ENGLE: Mr. Westerfield?

MR. WESTERFIELD: My objection, Your Honor, about

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MR. WESTERFIELD: (cont'd) not being relevant to any of the charges that are before you.

HEARING EXAMINER ENGLE: Well, I'm going to overrule that objection, but I fail to see the relevancy of the testimony to any violations which may or may not have occurred on September 9, 1992, or September 2, 1992.

MR. GALLO: Well, Your Honor, the charge is on or about, and it

covers — on or about could cover a certain period, and the client has admitted to drinking alcohol, but it doesn't say specifically 9/2/93 or 1/18/94. It just says on or about, and the client did admit to consuming alcohol, and I think that should go to showing that he was drinking while on parole.

MR. SCOTT: May I say something?

HEARING EXAMINER ENGLE: On or about's a very interesting term, Mr. Gallo, and I don't think that ought to be used for you or other parole agents to go fishing. I think on or about to me means if he wasn't September the 2nd, 1993, it was 12:59 a.m. on September the 1st or perhaps 12:02 on the 3rd. I'm still going to overrule counsel's objection as to relevancy, but I'll take the testimony — I'll give weight to testimony for what it's worth.

MR. GALLO: Thank you, Your Honor.

HEARING EXAMINER ENGLE: Counsel?

MR. WESTERFIELD: I have no questions for this

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MR. WESTERFIELD: (cont'd) witness then, Your Honor.

HEARING EXAMINER ENGLE: Are there any other questions

concerning either of these two conditions? We've dealt with A. We're finished with B as to this witness testifying?

MR. GALLO: Mr. Dunham, you and the client discussed no other technical parole violations. Is that correct?

MR. DUNHAM: No, we did not.

MR. GALLO: Okay. No further questions.

HEARING EXAMINER ENGLE: Okay. You don't have any questions for the witness, do you?

MR. WESTERFIELD: No, I don't but I'd like to have Mr. Scott testify to one or two questions in response to this testimony.

HEARING EXAMINER ENGLE: Okay. He's not going to be called to testify again?

MR. GALLO: No.

HEARING EXAMINER ENGLE: You can remain in the hearing room too. Now, before I give you an opportunity to do that, counsel, I have a question here. [Pause] Mr. Gallo . . .

MR. GALLO: Yes, sir.

HEARING EXAMINER ENGLE: . . . my notes indicate that the only testimony on this hearing record so far concerning condition 7a

is whatever testimony that you got from Agent

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HEARING EXAMINER ENGLE: (cont'd) Dunham. If you have anything further, let's get it on the record before we . . .

MR. GALLO: I have no further information. Mr. Hahn did address that in the Affidavit. Didn't Mr. Hahn address that question when he was in here?

HEARING EXAMINER ENGLE: The Affidavit does.

MR. WESTERFIELD: Pardon?

HEARING EXAMINER ENGLE: The Affidavit does.

MR. GALLO: The Affidavit does, and we added that into evidence, and I would refer to that.

HEARING EXAMINER ENGLE: Counsel?

MR. WESTERFIELD: Shall I call Mr. Scott again — recall him?

HEARING EXAMINER ENGLE: Sure.

MR. WESTERFIELD: Okay. Keith, you remember driving after you were arrested February 2, and you heard Officer Dunham just testify . . .

(TAPE FOUR)

MR. SCOTT: I told him that I had consumed alcohol, but I never made the way they're making it sound like I told them I was drinking, getting drunk or — I never said that. I said, "Yes, I did consume alcohol."

MR. WESTERFIELD: Okay. I have no other questions then, Your Honor.

HEARING EXAMINER ENGLE: Mr. Gallo, any questions

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HEARING EXAMINER ENGLE: (cont'd) of Mr. Scott?

MR. GALLO: No. I have no questions. I think Mr. Scott answered . . .

HEARING EXAMINER ENGLE: Okay. And this is on 7a. Now, did you have some testimony generally on condition 7a or 7b, or was that it?

MR. WESTERFIELD: I have one witness on character which if you're willing to hearing him is Mr. Scott's AA sponsor.

HEARING EXAMINER ENGLE: Can you give us an offer — well, before we get to that, I don't think my notes deal other than testimony by — other than the Affidavit, the testimony by previous

witnesses specifically with condition 5c, was it your intent that testimony — Mr. Gallo, that the testimony of Mr. Opperlee covered condition 5c?

MR. GALLO: 5b-c?

HEARING EXAMINER ENGLE: The allegation is that in some fashion Mr. Scott has alleged to have engaged in assaultive behavior specifically according to Mr. Scott's notice that during September of 1993 he threatened a co-worker, Gerald Thomas, by approaching Mr. Thomas and asking, "I'm going to fucking kill you," numerous times.

MR. GALLO: If you recall Mr. Opperlee's testimony, he . . .

HEARING EXAMINER ENGLE: I recall the testimony. I'm asking . . .

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MR. GALLO: Yes, yes. That is our testimony, that he observed this assault on one Gerald Thomas.

HEARING EXAMINER ENGLE: Counsel?

MR. WESTERFIELD: Shall I move to dismiss, Your Honor?

HEARING EXAMINER ENGLE: Sir?

MR. WESTERFIELD: Shall I move to dismiss that charge?

HEARING EXAMINER ENGLE: I can't tell you what to do, Mr. Westerfield.

MR. WESTERFIELD: I do move to dismiss the charge, Your Honor.

HEARING EXAMINER ENGLE: Basis?

MR. WESTERFIELD: No testimony of any assault — words only.

MR. GALLO: That's not correct. I object to that. That's not correct. Mr. Opperlee did testify that he seen Mr. Scott with two hammers taped to his hand and also that he said he did say threats (INAUDIBLE), but Mr. Opperlee would not read the threatening words. So assault is not an attack on a person. The words themselves constitute an assault. Just the overt action of going towards him and arguing was an assault.

HEARING EXAMINER ENGLE: So the Parole Board's allegation here is that by virtue of the fact that testimony was Mr. Scott and Mr. Thomas were in — let's see what it says

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HEARING EXAMINER ENGLE: (cont'd) on here — Mr. Opperlee's testimony was that he was present when Mr. Scott threatened Mr. Thomas.

MR. GALLO: That's correct.

HEARING EXAMINER ENGLE: They were having a major disagreement. Mr. Scott had two hammers with him.

MR. GALLO: That constitutes the assault, sir. The hammers were taped to his hands. They were not used in an ordinary business.

MR. WESTERFIELD: Your Honor, assault — the common law definition is an offense of physical touching which there's no testimony. I believe these guys were on a masonry job so having a hammer — this is not like taking a hammer in church and threatening somebody.

HEARING EXAMINER ENGLE: I gather that . . .

MR. GALLO: Your Honor, I don't agree with that.

HEARING EXAMINER ENGLE: Wait a second, gentlemen. We're not going to argue the issue. I'll decide that later, but all I want to know from Mr. Westerfield is if he wants to have any witnesses or Mr. Scott address the issue of the assaultive behavior.

MR. WESTERFIELD: No. I don't want to offer any testimony on that, Your Honor.

HEARING EXAMINER ENGLE: Fine. Okay. Now, you were

about to do something, Mr. Westerfield.

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MR. WESTERFIELD: Offer character evidence, Your Honor, since I think you're going to do — assuming you (INAUDIBLE) the violation, you're going to recommend some appropriate remedy for the violation, I think some character evidence might be helpful if you're willing.

HEARING EXAMINER ENGLE: Thank you for your confidence, Mr. Westerfield, but can we have an offer of what the character's testimony might be?

MR. WESTERFIELD: That since Mr. Scott's parole, one of his conditions was to attend AA meetings, and in order to attend AA meetings, you have to have a sponsor. And the witness agreed to act as Mr. Scott's sponsor and as his sponsor had some fairly quite significant contact with him, interaction, talking at AA meetings, and soul bearing or what I gather they do at these meetings, and the witness's impression of Mr. Scott, and Mr. Scott's — the fact that Mr. Scott was making an honest effort to succeed on parole and abide by the AA . . .

HEARING EXAMINE ENGLE: I think we'll hear the witness. Normally . . .

MR. GALLO: Can I have the witness's name?

HEARING EXAMINER ENGLE: He's here on the list for — the witness's name, it's my understanding, is Donald Byrnes?

MR. WESTERFIELD: Yeah.

MR. GALLO: Before you call the witness may I —

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MR. GALLO: (cont'd) Your Honor, before you call the witness may I address what he had to say? I have something to say about that.

HEARING EXAMINER ENGLE: Well, we've just heard — Mr. Westerfield's offer was that if Mr. Byrnes testifies, it's going to be with regard to his relationship with Mr. Scott, his observations as Mr. Scott's AA sponsor concerning that issue. You'll have an opportunity to ask questions though. We'll go off the record till the witness is available.

(OFF THE RECORD)

HEARING EXAMINER ENGLE: We're back on the record, and

the witness is in the hearing room. Sir, could I ask you to state your full name and address for the record please?

MR. BYRNES: Don Byrnes, 44 Silver Valley Court, Saylorsburg, Pennsylvania, 18353.

HEARING EXAMINER ENGLE: Thank you, Mr. Byrnes. You may remain seated. Would you raise your right hand? Mr. Byrnes, do you swear the testimony you're about to give at this hearing to be the truth, the whole truth, and nothing but the truth so help you?

MR. BYRNES: I do.

HEARING EXAMINER ENGLE: Thank you. Mr. Westerfield?

MR. WESTERFIELD: Mr. Byrnes, you're acquainted with Keith Scott?

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MR. BYRNES: Yes, sir.

MR. WESTERFIELD: And when did you first meet him?

MR. BYRNES: The middle of January — somewhere in the middle. It could have been towards the beginning of January to the middle of January.

MR. WESTERFIELD: Of 1994?

MR. BYRNES: Yes, sir.

MR. WESTERFIELD: And in what context did you come to meet him?

MR. BYRNES: At an AA meeting.

MR. WESTERFIELD: Are you employed now?

MR. BYRNES: No. I'm retired.

MR. WESTERFIELD: Prior to retiring, what kind of work did you do?

MR. BYRNES: Law enforcement.

MR. WESTERFIELD: For what agency?

MR. BYRNES: MTA, New York — Metropolitan Transit.

MR. WESTERFIELD: Transit Authority police?

MR. BYRNES: Yes sir.

MR. WESTERFIELD: And were you active on the beat as it were a policeman?

MR. BYRNES: Yes.

MR. WESTERFIELD: And how long have you been retired from that?

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MR. BYRNES: Since October of '89.

MR. WESTERFIELD: And how long have you lived in the Saylorsburg area?

MR. BYRNES: A little better than five months.

MR. WESTERFIELD: So you met Mr. Scott at an AA meeting in January of 1994, and did you develop some relationship with him through AA?

MR. BYRNES: Yes, sir.

MR. WESTERFIELD: What was that?

MR. BYRNES: He came to the meeting, and he appeared to be distorted, you know, out of whack, but he wanted to stop drinking. He maintained some sobriety prior to coming to the meeting, and when I met him he was saying he had a hard time not drinking, you know. He wanted to pick up a drink, and the only way he knew how was to come to meetings. He was also told that he had to attend three meetings a week — at least three meetings a week, and also get a sponsor. I spoke to him that night for approximately three hours during and after the meeting. The following day I was in contact with him also. I gave Keith my home number, and he called me. And we

continued our one-on-one relationship with that. And on the third day when I saw him, his appearance and his attitude was a drastic change. I saw a tremendous change — unkempt, unshaven, not caring too much about himself to a functional human being, and he was looking to take care of his problem in the right way.

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MR. WESTERFIELD: And did you become his AA sponsor at some point?

MR. BYRNES: Yes, sir. He asked me to become his sponsor, and I agreed to it, and I would give freely what I would give to myself. I maintained — I just celebrated nine years of sobriety February 4.

MR. WESTERFIELD: From that time then that you first met Mr. Scott, did you see him at meetings?

MR. BYRNES: Yes. We went together, and after meetings, we would be at the diner or at my house, but there was always contact from that point on up until the night before we were at the Snydersville Diner, and the night after that or the day after that's when Keith was picked up.

MR. WESTERFIELD: How long had you been in AA?

MR. BYRNES: Nine years it was on February 4.

MR. WESTERFIELD: And from your conversations with Mr. Scott and your experience in AA, were you able to form an opinion as to whether Mr. Scott was making a good faith effort to comply — to go along with the program in progress through AA?

MR. BYRNES: Yes. He was very sincere.

MR. WESTERFIELD: No other questions, Your Honor.

MR. GALLO: I just have one or two questions. When did you become his sponsor? Do you remember the date?

MR. BYRNES: Oh, it was about a week after I had

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MR. BYRNES: (cont'd) met him.

MR. GALLO: Okay. So it was in January sometime?

MR. BYRNES: Yes.

MR. GALLO: Okay. And also how many meetings was he — did he attend — in the beginning, did he attend meetings regularly with you or towards the end? By the end, I mean towards the time he was getting arrested?

MR. BYRNES: It was regular, and we were at — the New Freedom

group meets twice a week, and then the group on Main Street in Stroudsburg — there's two meetings — (INAUDIBLE) group and then there's one across the street in the church.

MR. GALLO: I have no further questions.

HEARING EXAMINER ENGLE: Thank you, Mr. Byrnes, for your willingness to come and testify. You may be excused.

MR. BYRNES: Thank you.

MR. WESTERFIELD: I have no other testimony.

MR. GALLO: I have no other testimony.

HEARING EXAMINER ENGLE: I'll give you an opportunity for any closing remarks you may wish to make. Mr. Westerfield?

MR. WESTERFIELD: Your Honor, Mr. Scott did testify about the count 5b-a, the possession of the .22 Magnum which while it may technically be a violation of the condition, I would say if there's going to be a violation as de minimus a

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MR. WESTERFIELD: (cont'd) violation as there can be. The 10mm Glock handgun from the testimony of Mr. Opperlee I think falls into the same category except there was one shot rather than two

or three as in the case of the .22 Magnum. 5b-c is the five firearms and the bow located in the house, and you've heard quite a bit of testimony on that. Although they were in the house, they were wrapped and stored. Mr. Scott, from the testimony that you've heard, was not aware that those items were in the house. His stepfather had wrapped them up intending to get them removed from the house, and they were in hiding within the house. There was no ammunition in the house, and there's no allegation that Mr. Scott was in actual possession of those at any point. 5c — the charge of assaultive behavior — I've already said that in my — I've already expressed to you my feeling that those are words only, that there was no action taken on them, and they were done in the course of a heated exchange between two individuals on a job, and there was no assaultive — there was no assault, and that Mr. Scott didn't touch this individual or strike him or in any way have physical contact with him. The condition 7a and b — there's testimony on those two from two individual who are obviously biased in the sense that there's this romantic involvement with Mrs. Hahn who's the mother of one and the husband to the other, and so that testimony does come from biased sources. And Mr. Scott

has denied specifically the

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MR. WESTERFIELD: (cont'd) consumption of Southern Comfort as alleged in 7b. Even if you are to find a violation on the basis of any of this evidence, I think that in view of the de minimus nature of any violation and testimony of Mr. Scott's character from the last witness, Mr. Byrnes, I think that Mr. Scott has been back in now from February 2 and that if you were to find a violation that the time he's been back in I think is consistent with giving him a message in view of the nature of the violations that are charged.

HEARING EXAMINER ENGLE: Thank you, Mr. Westerfield. Mr. Gallo?

MR. GALLO: Yes. I'd like to address the 5b-a and b. 5b-a is possession of a .22 Magnum revolver. It's quite clear that in the conditions of parole possession is possession. It doesn't mean a difference if you possess it for one minute or two minutes. You have possession, and that's all it takes tc do injury to anybody in the community, and I would just stress that point that length of possession does not count. It's possession. As far as B, he admitted — Mr. Scott

admitted that he did fire the gun. And again I would argue that it doesn't make any difference if he fired one round or 30 rounds. The law doesn't distinguish between number of times fired or length of possession. As far as 5b-c, Mr. Scott knew the conditions of parole, and it's incumbent upon him to make sure that there are no guns in that house. He just can't live

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MR. GALLO: (cont'd) in a world of void and say, "Well, I told them there should be no guns." It is up to him, and I think he ought to accept responsibility to that. As far as the assaultive behavior, assault — in order to have assaultive behavior — talking about assaultive behavior, you do not have to strike a person. An assault can merely be pointing your hand at a person and saying something threatening. If you would look at the statement that was — Mr. Opperlee said, he says that Mr. Scott was arguing with the man. He tape two hammers to his hand which is an assaultive gesture in itself, and it's quite common in the prisons. And then I'd like to address on 7a. True, we do not have anything but Mr. Hahn's statement, and that was entered into evidence I believe as S-1. But

Mr. Hahn said it in the beginning, and although he would not testify, that everything was true and correct. And, if anything, Mr. Hahn is prejudiced towards the Commonwealth's case, not the Defendant's case. So why would he lie to this one thing? If anything, he would have not. He would have told us. He did not tell us that. On 7a-b, on or about 1/18/94, he consumed Southern Comfort. Once again, even though the witness was very reluctant to testify in this case, he admitted that all statements given to the Parole Board were true and correct. So it doesn't make any difference what motive — if he has problems with his conscience about certain things, if the Defendant so did drink alcohol, he drank alcohol. And the

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MR. GALLO: (cont'd) motive for the Defendant — the witness coming forth and testifying to this does not count if the action is true, and that would be my argument.

HEARING EXAMINER ENGLE: Thank you, Mr. Gallo.

MR. WESTERFIELD: Well, Your Honor, a couple of misstatements — clearly are misstatements on Mr. Gallo's — if I may — the — Mr. Scott admitting to firing the .22 Magnum that's the subject of 5b-a,

not the 10mm. That's the subject of 5b-b. And, secondly, there was no testimony — you have a tape recorder — about hammers being taped to hands here.

HEARING EXAMINER ENGLE: I understand that.

MR. WESTERFIELD: Mr. Gallo's referred to that a couple of times in his comments, but there was no testimony to that.

HEARING EXAMINRE ENGLE: The documents previously identified as S-1 and D-1 are going to be made part of the hearing record as well as the two-page arrest report; a copy of the February 4, 1994, warrant; the Release Order; the conditions of parole; the March 23, 1994, Notice of Charges; and Mr. Scott's waiver of panel hearing; and Mr. Westerfield's entry of appearance by counsel. I'm going to close the hearing, gentlemen, unless there's a burning issue someone has.

MR. WESTERFIELD: May I have one moment?

HEARING EXAMINER ENGLE: Off the record.

(OFF THE RECORD)

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HEARING EXAMINER ENGLE: We're back on the record.

The Hearing Examiner has agreed contrary to his better judgment to hear a closing statement from Mr. Scott. Mr. Scott?

MR. WESTERFIELD: Which will be very brief Mr. Scott's assured me.

MR. SCOTT: Yes. Your Honor, I just wanted to say that, you know, you've heard testimony about me, but I haven't really been able to say what — you know, who I am and what I've been doing since I've been out on the street. And I've been locked up — I mean, isn't that what this is all about? I was locked up for 10 years, and I got out there, and it's difficult out there, you know. I go to work every day, you know. I was not, you know, going around drinking. The friends that I hang with are all older people. They're not kids causing trouble. I don't — I'm not like the trouble out there. I go to work, you know. I get up in the morning, and it's dark, and my hands are raw from carrying block all day. You know, I can't even tie my own shoes. No one, you know, takes into consideration. They just want to say bad things about me because they felt that I shouldn't have been free to the street, and I don't understand that. I'm not trying to brag about myself, but, you know, considering what my charges were to be put

in prison, I was given an opportunity while out on the street with my girlfriend to save a woman's life from jumping off the bridge, okay, and killing herself. Now, I'm

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MR. SCOTT: (cont'd) not saying that, oh, I should be patted on the back, but that's not the kind of behavior of a bad person I don't think. I had no reason to jump out of the van and hold onto that woman until my girlfriend flagged down cars for them to go call the police. I'm just saying that's — they try to make me look — they says that, "We never wanted you out of jail. Harrisburg released you." Well, I don't know why. What did I do to anybody for them to say, "Oh, it's okay to lie. You can tell us this. You know, we never wanted Keith on the street." I don't understand why. I am not mad at the agents for what they did. I just want some understanding of why I was treated like that. What did I do to them or to anybody? You know, if anything, I saved a life. I was able — I was given — I was blessed to make amends for what I was originally put in prison for. You know, that's the way I look at it. And I don't say that to like pat myself on the back. I didn't do that. That's not what was on my mind

when I jumped out of that van — so, "Oh, look at me," you know. And I never even considered it to be that, you know, look at the opportunity God made you to make amends for what you did years ago which you — but, yeah, that's it. So I don't — you know, the parole — I earned parole in September to be released on parole from the Parole Board, and I don't feel that they made a bad judgment by giving me parole. I feel that I've been working hard on the streets to do what I'm supposed to do. I

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MR. SCOTT: (cont'd) just wanted to say, you know, that — tell you what — who I am, what I've been doing. I mean, all's you've heard is like bad things about me. I don't see where there's any truth in them. I did — you know, I'm not going to — I can't lie about shooting the gun. I did shoot the gun. I ain't going to lie about that. It wasn't nothing — I didn't — and, yes, Your Honor, I knew that I shouldn't have, you know. I didn't think that, you know, it was a bad thing to — you know, I wasn't trying to hurt no one. It was to shoot at a target, and that was it. I wasn't like carrying guns around the way it was twisted to make it sound. That's all I have to say, Your Honor.

HEARING EXAMINER ENGLE: Thank you, Mr. Scott. At this time, the Examiner will have the record show the hearing is concluded.

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CERTIFICATION

I, BETH M. HURLBERT, hereby certify that the cassette tape as provided to me was reduced to writing by me, and the transcript is a true record of the tape.

I further certify that I am neither attorney nor counsel, nor related to, or employed by any of the parties in which this action is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 10th day of January 1995.

/s/
Beth M. Hurlbert

COMMONWEALTH OF PENNSYLVANIA
PENNA. BOARD OF PROBATION AND PAROLE

DATE: 060694

CLIENT NAME: KEITH M. SCOTT PAROLE NO. 4488X

INSTITUTION: STATE CORRECTIONAL INSTITUTION
DALLAS

INSTITUTION NO. BV-1645

AS RECORDED ON 052594 THE BOARD OF PROBATION AND PAROLE RENDERED THE FOLLOWING DECISION IN YOUR CASE:

RECOMMIT TO A STATE CORRECTIONAL INSTITUTION AS A TECHNICAL PAROLE VIOLATOR TO SERVE 36 MONTHS BACKTIME.

- 36 MONTHS FOR MULTIPLE TECHNICAL PAROLE VIOLATIONS.
- CONDITION #5B, COUNT 1, POSSESSION OF A 22 MAGNUM REVOLVER PISTOL.
- CONDITION #5B, COUNT 2, POSSESSION OF A 10 MILLIMETER GLOCK HANDGUN.
- CONDITION #5B, POSSESSION OF WEAPONS
- CONDITION #7, COUNT 1, CONSUMPTION OF ALCOHOL.

EVIDENCE RELIED ON: YOUR ADMISSION REGARDING CONDITION #5B, COUNTS 1 AND 3.
TESTIMONY OF MR. OPPERLEE REGARDING CONDITIONS #5B, COUNT 2 AND #5C.
TESTIMONY OF SUPERVISOR MUNDRO REGARDING CONDITION #5B, COUNT 3.
AFFIDAVIT OF ERIC HAN REGARDING CONDITIONS #5B, COUNT 1 AND CONDITION #7, COUNT 1.
REASONS: VIOLATIONS ESTABLISHED. EARLY FAILURE ON

PAROLE.

WHILE CONFINED, YOU MUST COMPLY WITH THE INSTITUTION'S PRESCRIPTIVE PROGRAM REQUIREMENTS AND HAVE NO MISCONDUCTS.
YOU MUST PARTICIPATE IN MENTAL HEALTH COUNSELING.
(CONTINUED ON PAGE 2)

PAROLE VIOLATION MAX DATE: 033103

/s/
JAMES W. RIGGS
BOARD SECRETARY

COMMONWEALTH OF PENNSYLVANIA
PENNA. BOARD OF PROBATION AND PAROLE

DATE: 060694

CLIENT NAME: KEITH M. SCOTT PAROLE NO. 4488X

INSTITUTION: STATE CORRECTIONAL INSTITUTION
DALLAS

INSTITUTION NO. BV-1645

AS RECORDED ON 052594 THE BOARD OF PROBATION AND PAROLE RENDERED THE FOLLOWING DECISION IN YOUR CASE

(CONTINUED FROM PAGE 1)

REVIEW IN APRIL, 1997.

PSYCHOLOGICAL EVALUATION TO BE AVAILABLE AT TIME OF REVIEW.

IF YOU WISH TO APPEAL THIS DECISION, YOU MUST FILE A REQUEST FOR ADMINISTRATIVE RELIEF WITH THE BOARD WITHIN THIRTY DAYS OF THIS ORDER. THIS REQUEST SHALL SET FORTH SPECIFICALLY THE FACTUAL AND LEGAL BASIS FOR THE ALLEGATIONS. SEE 37 PA CODE SEC. 73. YOU HAVE THE RIGHT TO AN ATTORNEY IN THIS APPEAL AND IN ANY SUBSEQUENT APPEAL TO THE COMMONWEALTH COURT.

JUN 16 1994

(H.R. 3/30/94 - JGA 6/6/94)

PAROLE VIOLATION MAX DATE: 033103

/s/
JAMES W. RIGGS
BOARD SECRETARY

COMMONWEALTH OF PENNSYLVANIA
PENNA. BOARD OF PROBATION AND PAROLE

DATE: 090694

CLIENT NAME: KEITH M. SCOTT PAROLE NO. 4488X

INSTITUTION: STATE CORRECTIONAL INSTITUTION
DALLAS

INSTITUTION NO. BV-1645

AS RECORDED ON 090694 THE BOARD OF PROBATION AND PAROLE RENDERED THE FOLLOWING DECISION IN YOUR CASE

MODIFY BOARD ACTION OF 5-25-94 BY ADDING AGGRAVATING REASONS:

MULTIPLE VIOLATIONS. YOU ARE CONSIDERED A THREAT.

IF YOU WISH TO APPEAL THIS DECISION, YOU MUST FILE A REQUEST FOR ADMINISTRATIVE RELIEF WITH THE BOARD WITHIN THIRTY DAYS OF THIS ORDER. THIS REQUEST SHALL SET FORTH SPECIFICALLY THE FACTUAL AND LEGAL BASIS FOR THE ALLEGATIONS. SEE 37 PA CODE SEC. 73. YOU HAVE THE RIGHT TO AN ATTORNEY IN THIS APPEAL AND IN ANY SUBSEQUENT APPEAL TO THE COMMONWEALTH COURT.

(JGA 9/4/94) SEP 08 1994

PAROLE VIOLATION MAX DATE: 033103

/s/
JAMES W. RIGGS
BOARD SECRETARY

November 8, 1994

George W. Westervelt, Jr., Esquire
304 Park Avenue
P.O. Box 549
Stroudsburg, PA 18360

RE: Keith M. Scott
Parole No. 4488-X

Dear Mr. Westervelt:

This is in response to your requests for administrative relief which were received by the Board on June 30, 1994 and October 5, 1994.

As a result of your requests for administrative relief, an indepth review of Mr. Scott's file was conducted and no error on behalf of the Board was found.

Accordingly, your request for administrative relief is denied.

Sincerely,

/s/
K. Scott Roy
Assistant Chief Counsel

KSR:dmb

cc: file

DATE MAILED: NOV 09 1994

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

KEITH M. SCOTT, Petitioner, v. PENNSYLVANIA BOARD OF PROBATION AND PAROLE, Respondent	DOCKET NO. _____

PETITION FOR REVIEW

TO THE HONORABLE, THE JUDGES OF THE COMMONWEALTH COURT:

THE PARTIES

1. The petitioner, Keith M. Scott, is an adult individual who is currently incarcerated at the state correctional institution at Dallas.

2. Respondent, the Pennsylvania Board of Probation and Parole, is a Commonwealth agency with its central office at P.O. Box 1661, 3101 North Front Street, Harrisburg, PA.

JURISDICTION

3. Jurisdiction in the Commonwealth Court of Pennsylvania is conferred by 42 Pa. C.S.A. §763 (1981).

BACKGROUND

4. In 1993, Mr. Scott was incarcerated in the state correctional institution at Dallas. On September 1, 1993, Mr. Scott was released on parole for the remainder of a ten to 20 year sentence with a maximum release date of March 31, 2003.

5. Mr. Scott has been under the supervision of the Board since his release on parole.

6. On February 4, 1994, Mr. Scott was arrested for parole violations. The charges were based on alleged violations which purportedly occurred between September 1993 and January 18, 1994.

7. On the same date, a notice of charges and hearing was sent to Mr. Scott. A copy of the notice is attached as Exhibit A.

8. A parole violation preliminary hearing was held on February 18, 1994. At the hearing, Mr. Scott was not allowed to call witnesses and, in some instances, was precluded from asking questions or presenting other evidence.

9. A revocation hearing was held on March 30, 1994. Mr. Scott had waived a hearing before the full Board. The hearing was held before Administrative Law Judge John Engle.

10. On May 25, 1994, the Board rendered a decision

recommitting Mr. Scott to a state correctional institution as a technical parole violator to serve 36 months back time.

11. Mr. Scott filed a timely administrative appeal.

12. On September 6, 1994, while the administrative appeal was pending, the Board issued a decision modifying the "Board action of 5-25-94 by adding aggravating reasons: Multiple violations. You are considered a threat."

13. Mr. Scott filed a timely administrative appeal from the modification order.

14. On November 8, 1994, the Board, through a letter by K. Scott Roy, Assistant Chief Counsel, denied Mr. Scott's request for administrative relief.

DECISIONS SOUGHT TO BE REVIEWED

15. Mr. Scott appeals from and seeks review of the following decisions made by the Board:

(a) The May 25, 1994 decision to recommit Mr. Scott "to a state correctional institution as a technical parole violator to serve 36 months back time." A copy of this decision is attached as Exhibit B.

(b) The September 6, 1994 decision modifying "Board action of 5-25-94 by adding aggravating reasons: Multiple violations. You are considered a threat." A copy of this decision is attached as Exhibit C.

(c) The November 8, 1994 letter-decision denying the requests for administrative relief. A copy of this letter-decision is attached as Exhibit D.

REASONS FOR APPEAL AND REVIEW

17. The Board erred in determining that Mr. Scott has committed technical parole violations, revoking his parole, and recommitting him to serve back time in that:

(a) The Board's decisions were neither based on nor established by substantial evidence;

(b) Notice of hearing and charges are unconstitutionally vague. They are in violation of the mandatory established procedures that govern Mr. Scott's due process rights. With the exception of one alleged violation, none of the charges listed afforded Mr. Scott any meaningful way in which to defend

himself;

(c) The weapon's violations and the revocations bases thereon were the product of an illegal search. The search was unlawful in that parole agents misrepresented themselves when having a key to the home of Mr. and Mrs. John McDaniel (Mr. Scott's approved residence). They violated the law by unlawfully restraining Mr. Scott's girlfriend, giving her the key to Mr. and Mrs. McDaniel's home and then ordering Mr. Scott's girlfriend to open the door or she would be placed under arrest. The search of Mr. Scott's approved residence was begun and conducted without a warrant and without the knowledge of the homeowners.

(d) The decisions were based, in part, on alleged admissions made by Mr. Scott which were never made and are not established by any competent evidence in the record;

(e) The decisions were based, in part, on impermissible

and improper hearsay;

(f) With respect to condition 5(c), the evidence did not establish, by any evidentiary standard, that Mr. Scott had custody, control, or actual or constructive possession, or even knowledge of the weapons charged; the evidence did establish that the weapons were the property of John McDaniel and had been wrapped and hidden by Mr. McDaniel;

(g) The Board's decisions were erroneous as a matter of law and violated Mr. Scott's constitutional rights in that the decisions were based, in part, on findings made at Mr. Scott's preliminary hearing when:

(i) his request and right to call voluntary witnesses who were present and able to speak on his behalf to establish his innocence was denied by the hearing examiner; and

(ii) his right to speak and provide testimony at the preliminary hearing was also denied.

(h) The Board's decisions were erroneous as a matter of

law and violated Mr. Scott's constitutional rights in that they were based, in part, on an affidavit or statements made by a witness, Eric Hahn, in that:

(i) during the revocation hearing, Mr. Hahn stated that he would not testify because he had been coerced by a parole agent into making and signing statements which were not true against Mr. Scott (see affidavit of Eric Hahn attached and marked Exhibit E);

(ii) at hearing, the administrative law judge threatened and coerced Mr. Hahn by indicating that he would prosecute or prefer charges against Mr. Hahn if he did not recant his testimony that he had been coerced into making the statements and affirm the facts listed in the coerced affidavit, all of which was done over the objection of counsel for Mr. Scott;

(iii) the decisions were based, in part, on other

affidavits or statements of Mr. Hahn which were never produced, thereby preventing Mr. Scott from having a meaningful opportunity to question or cross-examine witnesses and confront the evidence against him.

(i) The Board erred in imposing 36 months back time, which exceeds the maximum presumptive recommitment range of 18 months for multiple technical parole violations, in that the decision to exceed the presumptive range is neither sufficiently justified not supported by substantial evidence.

WHEREFORE, petitioner Keith M. Scott requests that this Honorable Court review and set aside the Board's decisions, or, in the alternative, reduce the back time recommitment to the presumptive range.

/s/

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(6)

Supreme Court, U.S.
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No. 97-581

In The Supreme Court Of The United States

OCTOBER TERM, 1997

PENNSYLVANIA BOARD OF
PROBATION AND PAROLE,
Petitioner

vs

KEITH M. SCOTT,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a search of a parolee's residence by parole agents must be based on reasonable suspicion to be valid under the Fourth Amendment, where the parolee has consented to searches as a condition of parole?

2. Whether the exclusionary rule should apply to parole revocation proceedings?

LIST OF PARTIES

Petitioner is the Pennsylvania Board of Probation and Parole, an agency of the government of the Commonwealth of Pennsylvania. Respondent is Keith M. Scott.

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The opinion of the Supreme Court of Pennsylvania is reported at 698 A.2d 32 (1997) and is reprinted in the Appendix to the Petition for Writ of Certiorari (Pet. App.) at 1a. The opinion and order of the Commonwealth Court of Pennsylvania are reported at 668 A.2d 590 (1995), and are reprinted in the Pet. App. at 19a.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Pennsylvania was filed on July 3, 1997, and the petition for writ of certiorari was filed within ninety days thereafter on September 30, 1997. The Court granted certiorari by order of November 26, 1997, and has jurisdiction to review the decision of the state supreme court pursuant to 28 U.S.C. §1257(a). *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975) (judgment is final and reviewable where federal issue is finally decided, with further proceedings in state tribunals to come, but in which later review of federal issue cannot be had).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution of the United States provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. Amend. IV.

2. Pennsylvania statutes provide in relevant part as follows:

> The board [of probation and parole] is hereby authorized to release on parole any convict confined in any penal institution of this Commonwealth . . . except convicts condemned to death or serving life imprisonment, whenever in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby.

Pa. Stat. Ann. tit. 61, §331.21 (Purdon Supp. 1997).

> Any parolee under the jurisdiction of the Pennsylvania Board of Parole released from any penal institution in the Commonwealth who, during the period of parole, violates the terms and conditions of his parole, . . . may be recommitted after hearing before the board. . . .
>
> Such prisoner shall be subject to reparole by the board whenever in its opinion the best interests of the prisoner justify or require his being reparoled

and it does not appear that the interests of the Commonwealth will be injured thereby.

Pa. Stat. Ann. tit. 61, §331.21(b) (Purdon 1964).

> . . . In granting and revoking paroles, and in discharging from parole, the members of the board acting thereon shall not be required to personally hear or see all the witnesses and evidence submitted to them for their action, but they may act on report submitted to them by their agents and employes [*sic*], together with any pertinent and adequate information furnished to them by fellow members of the board or by others.

Pa. Stat. Ann. tit. 61, §331.22 (Purdon Supp. 1997).

> The board shall have the power, and it shall be its duty, to make general rules for the conduct and supervision of persons heretofore or hereafter placed upon parole. In addition to the power to make general rules and regulations hereby granted, the board may, in particular cases, as it deems necessary to effectuate the purpose of parole, prescribe special regulations for particular parolees.

Pa. Stat. Ann. tit. 61, §331.23 (Purdon 1964).

STATEMENT OF THE CASE

The issues presented are whether the Fourth Amendment requires a search of a parolee's residence by parole agents to be based on reasonable suspicion, where the parolee has consented to searches as a condition of parole, and whether the exclusionary rule should apply to parole revocation proceedings to exclude evidence found to have been obtained in violation of the Fourth Amendment. The case arises from parole revocation proceedings before a state parole board. Petitioner is the Pennsylvania Board of Probation and Parole ("Board"); respondent is Keith Scott, a parolee supervised by the Board.

1. The Board is an agency of the Commonwealth of Pennsylvania authorized to parole certain classes of convicted offenders whenever the best interests of the offender justify or require it and the interests of the Commonwealth are not injured thereby. Pa. Stat. Ann. tit. 61, §331.21 (Purdon Supp. 1997). A parolee who violates the terms and conditions of his parole may be recommitted to prison after a hearing. *Id.* at §331.21(b) (Purdon 1964). On September 1, 1993, Scott was paroled by the Board from a 10-20 year term of imprisonment for conviction of third degree murder. J.A. 2a-3a. As a condition of his parole, Scott signed an agreement expressly consenting to searches of his person, property or residence by Board agents without a warrant. J.A. 4a,7a. In particular, his agreement stated:

> In consideration of being granted the privilege of parole/reparole by the Pennsylvania Board of Probation and Parole, I hereby agree that: . . . I expressly consent to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any items, in [*sic*] the possession of

> which constitutes a violation of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.

J.A. 6a-7a. Other conditions of Scott's parole included his agreement to reside with his mother and not change his residence without parole staff permission, to maintain regular contact with the parole staff, to abstain from the use of alcohol and controlled substances, to refrain from any assaultive behavior, and to refrain from "owning or possessing any firearms or other weapons." J.A. 4a-8a.

On February 4, 1994, the Board issued an order to detain Scott, together with a notice charging him with several violations of the terms and conditions of his parole. J.A. 9a-11a. Among the conditions alleged to have been violated was the prohibition against the ownership or possession of any firearms or other weapons. J.A. 10a. This violation was supported by three counts, one of which charged that on February 4, 1994 several weapons — including three shotguns, a semi-automatic rifle, and a bow and arrows -- were found in Scott's residence by parole agents.[1] J.A. 10a.

A hearing examiner for the Board conducted a hearing on the allegations of parole violations on March 30, 1994. J.A. 18a. At the hearing, Scott argued that the parole agents' search of his residence violated his right to be free from unreasonable searches and seizures because of a lack of consent to search. J.A. 79a,82a. The hearing examiner overruled Scott's objection to introduction

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[1]Besides the charges of violation of the firearms condition, Scott also was charged with violating the prohibition against assaultive behavior and consumption of alcohol. J.A. 10a-11a.

of evidence concerning the search and its results, and allowed a parole agent to testify about the search. J.A. 84a-85a.

The testimony revealed that on February 4, 1994, parole agents decided to search Scott's residence for firearms. J.A. 83a. The agents had received information previously that Scott had used firearms while on parole, J.A. 42a-43a, and they had discussed the possibility of the presence of weapons in Scott's home. J.A. 83a,92a. The agents located Scott at a diner near his residence and, after obtaining a key to his residence from Scott, proceeded to the residence accompanied by a female friend of Scott's, entered the residence in the presence of the friend, and asked the friend to telephone Scott's mother (who owned the residence). J.A. 80a-82a. Until Scott's mother arrived, the parole agents remained in the kitchen of the house. J.A. 81a. When she arrived, the agent in charge explained to Scott's mother that the agents intended to search Scott's room. J.A. 81a. Scott's mother at first hesitated to tell the agent where Scott's room was located but, when informed that the agents intended to find it, she escorted them upstairs and directed them to Scott's bedroom.[2] J.A. 81a.

The parole agents discovered four shotguns and a semi-automatic rifle under a sofa in a room next to Scott's bedroom. J.A. 86a-88a. In a closet in the same room, they also discovered a camouflage-colored bow and three arrows. J.A. 87a.

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[2]The agent advised the hearing examiner that he believed he had the authority to search Scott's bedroom and common living areas in the residence, with or without the mother's approval, based on the parolee's being supervised by the Board and living in a residence that had been "approved" by the Board at the time of his release on parole. J.A. 82a-83a. Scott's mother's residence was Scott's Board-approved residence. J.A. 4a,80a.

Although Scott's mother did not testify at the hearing before the hearing examiner, the parole agent informed the examiner that, when the weapons were discovered, Scott's mother advised the agent that they belonged to her husband, J.A. 88a-89a, and her husband so testified. J.A. 98a-99a.

2. The Board relied in part on the evidence obtained from Scott's residence when it revoked Scott's parole. J.A. 137a-140a. It relied on evidence other than the results of the search with respect to certain violations,[3] but with respect to the violation concerning the shotguns, rifle and bow and arrows, the Board relied upon the testimony of the parole agent who conducted the search. J.A. 137a. The Board returned Scott to prison to serve thirty-six additional months of imprisonment for the parole violations.[4] J.A. 137a. Scott's request for further administrative review of the Board's recommitment decision was denied, J.A. 142a, and he then appealed to the Commonwealth Court of Pennsylvania.[5] J.A. 143a.

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[3]For example, the Board relied upon Scott's admission that he had been target practicing with a firearm, upon testimony from a co-worker that Scott had threatened another co-worker, and upon an affidavit of another person that Scott had consumed alcohol and had used a weapon to target practice. J.A. 137a.

[4]Although not of record, we inform the Court that Scott was refused reparole in April 1997 and his status is scheduled to be reviewed by the Board in March 1998.

[5]The Commonwealth Court is the intermediate appellate court in Pennsylvania vested with jurisdiction to hear appeals from state administrative agencies, including the Board of Probation and Parole. *See* 42 Pa. Cons. Stat. §763.

3. On appeal, Scott raised a number of issues including the argument that the weapons violation was the product of an illegal search. J.A. 147a. While his petition for review did not mention the Fourth Amendment specifically, it raised as issues the absence of a warrant and consent, J.A. 147a, and the Fourth Amendment issues were briefed by the parties. A panel of the Commonwealth Court concluded that, although parole revocations are administrative proceedings and not criminal prosecutions, a parole agent may not conduct a warrantless search of a parolee's residence in the absence of consent of the owner or what it termed a "statutory or regulatory framework that satisfies the reasonableness requirement of the Fourth Amendment." Pet. App. 29a. Declaring that Scott's previously-executed written consent to a search of his residence and to seizure of items found by parole agents did not comport with the Fourth Amendment, the Commonwealth Court panel decided that Scott's Fourth Amendment rights had been violated. Pet. App. 30a-31a. The court went on to hold that the exclusionary rule should apply to parole revocation hearings, Pet. App. 37a, and that it was "necessary" to apply it to the weapons seized from Scott's residence. Pet. App. 37a. As a result, the court decided that the hearing examiner should have excluded evidence concerning the weapons, and it reversed the parole revocation decision and remanded the matter for a new revocation hearing. Pet. App. 37a.

4. The Board then petitioned the Supreme Court of Pennsylvania for allowance of appeal to address the Fourth Amendment issue, and the state supreme court granted the

petition.[6] J.A. 1a. Between the time of the state supreme court's granting of the petition and its decision in the case, the Commonwealth Court issued a decision *en banc* which overruled its panel decision in this case. *See Kyte v. Pennsylvania Board of Probation and Parole*, 680 A.2d 14, 18 n. 8 (Pa. Cmwlth. Ct. 1996) (en banc). The Board brought this intervening decision to the attention of the state supreme court and requested the court to remand the case to the Commonwealth Court. The state supreme court denied the request and proceeded to decide the appeal.

The state supreme court affirmed the panel decision of the Commonwealth Court. Pet. App. 1a. Relying upon suppression decisions in the criminal prosecution context, Pet. App. 7a-10a, the court held that Scott "has a Fourth Amendment right against unreasonable searches and seizures that is unaffected by his signing of the consent to search provision" when he was paroled. Pet. App. 10a. The court went on to hold that Scott's Fourth Amendment right was violated because, in its view, the search of his residence "was conducted without reasonable suspicion." *Id.* Furthermore, the state supreme court concluded that the exclusionary rule should be "extended" to parole revocation proceedings because of its "deterrent effect." Pet. App. 10a, 16a.

While recognizing that a majority of the United States Courts of Appeals has concluded that the exclusionary rule is inapplicable to parole revocation proceedings, *id.* at 12a-13a, and that this Court had yet to address the issue, *id.* at 13a n. 8, the

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[6]Under Pennsylvania law, the state supreme court's decision whether to accept an appeal from an intermediate appellate court, in a matter originally commenced in an administrative agency, is a discretionary decision. *See* 42 Pa. Cons. Stat. §724.

state supreme court nonetheless concluded that "there is a need to apply the exclusionary rule to the [parole] revocation process since otherwise there is nothing to deter a parole agent from conducting an illegal search or engaging in other illegal activity to obtain evidence." Pet. App. 15a. Thus, notwithstanding Scott's written consent to searches by parole agents as a condition of his parole, and notwithstanding the settled differences between a criminal prosecution and an administrative parole revocation, the state supreme court concluded:

> In the Fourth Amendment context, when an officer is aware or has reason to be aware of a suspect's [*sic*] parole or probationary status, he must have reasonable suspicion of a parole violation in order to conduct a search. If a reasonable suspicion does not exist, the exclusionary rule will apply in the parole revocation hearing. This holding modifies our *per se* bar against the application of the exclusionary rule in parole revocation hearings . . . and applies the exclusionary rule in revocation hearings when the officer who engaged in the misconduct is aware of the parolee's status.

Pet. App. 16a-17a (footnotes omitted). The court then held that the exclusionary rule applied to Scott's parole revocation hearing and that the evidence obtained from the search of his residence should be suppressed.[7] Pet. App. 17a.

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[7]The court specifically stated that its decision was "premised solely upon federal constitutional grounds," and it left "for another day" the question of the applicability of Pennsylvania's constitutional counterpart to the Fourth Amendment. Pet. App. 17a n.13.

The Court granted the Board's petition for writ of certiorari on November 26, 1997.

SUMMARY OF ARGUMENT

1. The supervision of parolees by parole authorities falls into that small class of cases, recognized by the Court, in which searches without any individualized suspicion of wrongdoing are nevertheless "reasonable" within the meaning of the Fourth Amendment. The Court has upheld such searches — of closely regulated businesses, for example — where a diminished expectation of privacy, plus an important governmental need met by the search, combine to justify them.

Certainly, parolees have a diminished expectation of privacy. The government routinely subjects convicted criminals, conditionally released on parole, to a variety of restrictions, some of which would not be constitutional if applied to the general public, and violation of which is grounds for immediate recommitment. Parolees may, for example, be forbidden to change their residence without permission, to consume alcoholic beverages or illegal drugs, to possess weapons, or to commit further crimes; they may be required to undergo treatment for drug or alcohol dependence, or to avoid certain persons or locations. Parolees are thus, like probationers, in a supervisory relationship with the government quite unlike that of free citizens.

Nor can the importance of the governmental interest be overstated. As the Court has recognized, such restrictions on parolees serve the dual purpose of protecting the public safety from further harmful behavior, and of furthering the rehabilitation and reintegration of the offender into society. The Court has likewise recognized the overwhelming interest of the government in promptly recommitting parolees who do not comply with the conditions of their parole.

To ensure compliance with these restrictions, government thus requires broad discretion to define the conditions under which the persons and property of parolees may be searched. The government may therefore require that convicted criminals, as a condition of parole, submit to searches without any need for an individualized suspicion of wrongdoing, as long as those searches are related to some legitimate penological objective, such as ensuring that parolees are complying with the conditions of their release.

2. Even if respondent's consent did not authorize the search of his residence and the search did not meet a reasonableness standard, evidence obtained from the search should not be excluded from consideration by parole authorities. The exclusionary rule, adopted to safeguard Fourth Amendment rights in the criminal prosecution context, exacts substantial social costs by impeding the search for truth. The Court has declined to extend application of the rule beyond criminal trials and direct review, and should do likewise in this case. The States have a great interest in receipt of all information bearing upon the question whether the parolee is successfully reintegrating into society; this interest should not be frustrated by the exclusion of relevant information especially in a case where the rationale of deterrence of police behavior is inapplicable.

The Pennsylvania Supreme Court gave undue weight to the importance of the parolee's limited interest and blurred the significant distinctions between a criminal prosecution and a parole revocation. The court thus inappropriately extended application of the exclusionary rule to suppress evidence concerning respondent's compliance with parole conditions. The judgment of the court, therefore, should be reversed.

ARGUMENT

I. ABSENT EVIDENCE THAT THE SEARCH OF SCOTT'S RESIDENCE WAS FOR AN ILLEGITIMATE PURPOSE, HIS CONSENT ENTITLED THE PAROLE AGENTS TO SEARCH HIS HOME WITHOUT A PARTICULAR LEVEL OF SUSPICION.

While the Supreme Court of Pennsylvania acknowledged that respondent Scott had consented to searches by parole agents as a condition of his parole, and purported to examine the consent provision in the context of a balance of the relative interests involved, the court failed to recognize the importance of parole conditions to society's interest in managing criminal offenders. Instead of focusing on the special need of the government to place legitimate parole conditions — like a consent to search provision — on parolees, the state supreme court summarily dismissed the provision and equated the parolee's interest with that of a free citizen. The court thus erred in its analysis of both the importance of legitimate parole conditions in general and the value of a consent to search condition in particular.

1. The Fourth Amendment to the Constitution provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. Amend. IV. The prohibition against unreasonable searches and seizures is applicable to state officers. *Elkins v. United States*, 364 U.S. 206, 213 (1960). Although the Court usually has required that, in order to satisfy the Fourth Amendment, a search of an individual's home should be undertaken only pursuant to a warrant (and thus supported by probable cause), the Court also

has recognized that special needs of the government — beyond the normal need for law enforcement — permit exceptions to the usual requirements of the Fourth Amendment. Indeed, as the Court reiterated just last Term, the "touchstone" of the Fourth Amendment is reasonableness, and reasonableness in turn is "measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. ____, 117 S.Ct. 417, 421 (1996).

—

a. To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. *Chandler v. Miller*, ___ U.S. ___, 117 S.Ct. 1295, 1301 (1997). The Court has recognized, however, that in some cases suspicionless searches are permissible. *Id., citing Vernonia School District v. Acton*, 515 U.S. ___, 115 S.Ct. 2386, 2399 (1995) (random drug tests of student-athletes); *Skinner v. Railway Labor Executives Association*, 489 U.S. 609, 619 (1989) (drug and alcohol tests for railway employees involved in train accidents); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989) (drug tests as condition of promotion in Customs Service); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 447 (1990) (sobriety checkpoints along highways). The exceptions are based on "special needs, beyond the normal need for law enforcement." *Skinner*, 489 U.S. at 619. In addition, the Court has held that in certain situations probable cause is not necessary to effect a search. The Court has held, for example, that government employers and supervisors may conduct warrantless searches of employees' desks and offices without probable cause. *O'Connor v. Ortega*, 480 U.S. 709, 721-25 (1987). Similarly, the Court has held that government investigators conducting searches of closely-regulated businesses need not adhere to the warrant or probable cause requirements as long as the searches meet reasonable legislative or administrative standards. *New York v. Burger*, 482 U.S. 691, 702 (1987)

(automobile dismantling business). *Accord Donovan v. Dewey*, 452 U.S. 594, 600 (1981) (coal mining); *United States v. Biswell*, 406 U.S. 311, 316 (1972) (firearms sales); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (catering business engaged in liquor sales). In addition, the Court has held that the search of a high school student's purse by school officials does not require a warrant or probable cause, *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1985), as well as that, because of the extraordinary needs of those charged with administering prisons, the Fourth Amendment is inapplicable to the search of a prison inmate's cell. *Hudson v. Palmer*, 468 U.S. 517, 526 (1984). The Court also has held that law enforcement officials may stop individuals for questioning or observation at fixed border checkpoints without a particular level of suspicion. *United States v. Martinez-Fuerte*, 428 U.S. 543, 545-50 (1976). Finally, and closely analogous to this case, the Court has held that the search of a probationer's home by state probation officers, pursuant to a regulation requiring "reasonable grounds," does not require a warrant supported by probable cause. *Griffin v. Wisconsin*, 483 U.S. 868, 876-77 (1987).

Thus, the Court clearly has recognized situations where the usual requirements of the Fourth Amendment simply do not apply or the particular circumstances and needs permit "exceptions" to the general rule. *Griffin*, 483 U.S. at 873. When such special needs exist, the Court has undertaken a "context-specific" inquiry, examining the competing interests at stake. *National Treasury Employees Union v. Von Raab*, 489 U.S. at 665-66; *Skinner*, 489 U.S. at 624.

b. In *Griffin v. Wisconsin*, the Court premised its conclusion that a state's operation of a probation system presents special needs, justifying departures from the usual requirements, on the fact that probation — like incarceration — is a "form of

criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty;" it represents one of several options on a "continuum of possible punishments ranging from solitary confinement in a maximum security facility to a few hours of mandatory community service." 483 U.S. at 874 (citations omitted).

The operation of a system of supervised release on parole — just as a probation system — presents special needs justifying departure from the usual Fourth Amendment requirements. As the Court has recognized, the "essence" of parole is release from prison, before completion of the sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). Parole has become an "integral part" of the nation's overall system of managing offenders. *Ibid.* The Court has described parole as follows:

> Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison.

Ibid. In recognition of the conditional liberty restored to an offender by parole, the Court has held that revocation of parole deprives him not of an "absolute" interest but of an interest "properly dependent on observance of special parole restrictions," *id.* at 480, and that revocation needs to be accompanied by only informal procedural protections. *Id.* at

487-88.

Furthermore, as the Court recognized in *Morrissey*, to accomplish the purpose of parole, those who are granted permission to leave prison early properly may be subjected to very specific conditions. These conditions "restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen," *id.* at 478, and can include such restrictions as the need to seek permission to change residences, a prohibition against consumption of alcohol, and the direction to refrain from association with certain individuals or engaging in certain activities. *Ibid.*

Supervision of parolees, therefore, plainly is a "special need" of the States "permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Griffin v. Wisconsin*, 483 U.S. at 875. While restrictions upon a free citizen's right to travel or to associate with others of his choosing certainly could present significant constitutional concerns, the Court has recognized that the diminished expectation of privacy of probationers and parolees, together with society's need to supervise them closely, permits these restrictions. The Court has stated:

> To a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy "the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special . . . restrictions."

Griffin, 483 U.S. at 874, quoting *Morrissey*, 408 U.S. at 480.

As such, parolees are subject to conditions governing

their activities that could not be imposed upon the general public but which, because of the special importance of monitoring their behavior, are appropriate and thus constitutional. *Griffin*, 483 U.S. at 874-75.

2. Among the several conditions of parole to which Scott agreed in this case was an express consent to searches of his person, property and residence by agents of the Board without a warrant. J.A. 6a-7a. Scott further consented to the seizure and use as evidence of any items the possession of which constituted a violation of his parole. *Id.* The particular parole condition found by the Board to have been violated by Scott when the weapons were discovered by the agents was the condition directing him to refrain from "owning or possessing any firearms or other weapons. . . ." J.A. 5a, 137a.

In exchange for his early release from prison, therefore, Scott agreed to certain conditions a violation of which would permit the Board to revoke his parole and recommit him to prison. *See* Pa. Stat. Ann. tit. 61, §331.21(b) (Purdon 1964). There is, of course, no requirement that a parolee accept the parole conditions; he is free to reject the conditions and serve out his sentence in prison. Scott in this case not only agreed to certain parole conditions governing his behavior and activities while on parole, J.A.4a-8a, but he also expressly consented to warrantless searches by parole agents. *Id.* at 7a.

These types of conditions are no different than conditions requiring substance abuse treatment, mental health treatment or other rehabilitative programming, all of which demonstrate diminished privacy expectations by a parolee over his conduct and his person. *Morrissey v. Brewer*, 408 U.S. at 478-79. As the Court noted in *Morrissey*, ". . . conditions of parole serve a dual purpose; they prohibit, either absolutely or conditionally,

behavior that is deemed dangerous to the restoration of the individual into normal society. And through the requirement of reporting to the parole officer and seeking guidance and permission before doing many things, the officer is provided with information about the parolee and an opportunity to advise him." *Id.* at 478. As further explained by a leading commentator:

> The probation or parole officer has the primary responsibility for supervision of a parolee's or probationer's rehabilitative process. This caseworker, charged with monitoring the offender's performance, owes a responsibility to the public to ensure that probationers and parolees who pose a threat to public safety are not permitted to remain free absent compliance with conditions which obviate possible danger.

J. Gobert & N. Cohen, *The Law of Probation and Parole*, §8.02 (1983) (footnotes omitted).

It is thus apparent that the parole agent performs an extremely important function in a State's overall penological system: he or she not only must monitor the parolee's activities so as to assist the parolee's reintegration into society, but also must protect the public by taking action, where appropriate, to remove the parolee from society if the parole conditions are not met. There can be little doubt that, just like conditions requiring treatment or restricting his association with other offenders, an express agreement by a parolee to permit searches by parole agents is a significant tool to aid the agent in fulfilling the agent's responsibility to the parolee and to society. The parolee's consent allows the agent to make unannounced inspections of the parolee's residence to assure compliance with

parole conditions.

The Court's decisions addressing suspicionless searches in the drug-testing area and in closely-regulated businesses provide an apt analogy to the parole situation. In *New York v. Burger*, 482 U.S. 691 (1987), for example, the Court recognized that, as in other situations of special need, where the individual's privacy interest is weakened and the government's interest in regulation of behavior is heightened, a warrantless surprise inspection is reasonable if it meets certain criteria: a substantial governmental interest; a need for warrantless inspections to further the regulatory purpose; and the absence of unlimited discretion on the part of the inspection officers. 482 U.S. at 702-03. *Accord Vernonia School District v. Acton*, 515 U.S. at ___, 115 S.Ct. at 2395; *Skinner*, 489 U.S. at 627. The Court thus has recognized the value of unannounced suspicionless searches in the context of State regulation of commercial enterprises and other related situations where "an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion ...." *Skinner*, 489 U.S. at 624. In holding that warrantless inspections of junkyards by police officers did not violate the Fourth Amendment, the Court in *Burger* noted, "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential." *Id., quoting United States v. Biswell*, 406 U.S. at 316. Indeed, as the Court stated in *Burger*, surprise is "crucial" if the governmental regulatory scheme is to function. *Ibid.*

If unannounced suspicionless searches are "essential" and "crucial" in the context of commercial regulation, they surely are equally as important — if not more so — in the context of managing a State parole system charged with protecting the public. As the agent who conducted the search in this case testified, the value of the search depends upon the agents' ability

to locate any contraband before the parolee or a person with whom he is living has an opportunity to remove it. J.A. 81a-82a. A consent to search provision — like the unannounced inspection in the commercial regulatory situation and suspicionless drug testing in the railway transportation situation — thus enables the agent to conduct a search that serves as a "credible deterrent." *Burger*, 482 U.S. at 710; *accord Skinner*, 489 U.S. at 628.

3. The state supreme court's decision in this case summarily dismissed the importance of the consent condition and the value of unannounced searches. Pet. App. 9a-10a. Indeed, it converted an express consent into what it termed a simple "acknowledgment that the parole officer has a right to conduct reasonable searches. . . without a warrant." *Id.* Such a characterization not only distorts the plain meaning of the consent provision but, more importantly, fails to afford the deference due those who administer a vital part of the State's penological system. As the Court often has stated in the related context of corrections administration, it should not be for the courts to second-guess the need for a penal regulation or policy as long as it is "reasonably related to legitimate penological interests." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987); *Turner v. Safley*, 482 U.S. 78, 89 (1987). The consent to search provision, agreed to by Scott as a condition of parole, certainly meets this standard.

This is not to suggest, however, that such a consent provision should authorize all searches no matter when or how conducted. Just as prison inmates should be governed by policies and rules that are "reasonably related to legitimate

penological objectives,"[8] so too should parolees be entitled to expect that searches of their residence and person are reasonably related to the legitimate penological objectives of parole supervision. *Accord Griffin v. Wisconsin*, 483 U.S. at 876-77 (reasonable state regulation governing searches of probationers' homes satisfies Fourth Amendment).

The record in this case supports the notion that the search of Scott's residence was reasonably related to legitimate parole objectives. The parole agents had received information that Scott had been using weapons while on parole, and they went to his home with the purpose of attempting to locate firearms; they knew they were looking specifically for such weapons. J.A. 42a,43a,83a. Ownership or possession of firearms by Scott was specifically prohibited by a condition of his parole. J.A.5a. Preventing a parolee from having access to such weapons — particularly a parolee who has been convicted of murder, J.A. 2a — clearly is a legitimate penological objective. An unannounced search for firearms which may be in the possession or control of a parolee already convicted of murder plainly is reasonably related to a legitimate parole objective.[9]

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[8] *O'Lone v. Estate of Shabazz*, 482 U.S. at 349; *Turner v. Safley*, 482 U.S. at 89.

[9] While the record demonstrates that the weapons found in Scott's home actually were owned by his mother's husband, J.A. 99a , this does not detract from the legitimate objective of the search. Regardless whether Scott customarily entered the room where the weapons were found, J.A. 103a, or whether they were "owned" by him, J.A. 99a, the fact remains they were available to him. J.A. 104a-105a. Moreover, even if the evidence supported the proposition that Scott never used the weapons or that he did not enter the room where they were located, it nonetheless was objectively reasonable for the

The value of parole agents' searches of parolees' residences is eliminated if parolees know that the agents must have a particular suspicion of a violation or must obtain a warrant before searching. The Court in *Griffin* acknowledged the value of such a search, even on the basis of an "unauthenticated tip," 483 U.S. at 878, and held that the search of a probationer's residence based on such a tip was reasonable. *Id.* at 879.

> In such circumstances it is both unrealistic and destructive of the whole object of the continuing probation relationship to insist upon the same degree of demonstrable reliability of particular items of supporting data, *and upon the same degree of certainty of violation*, as is required in other contexts. In some cases — especially those involving drugs or illegal weapons — the probation agency must be able to act based upon a lesser degree of certainty than the Fourth Amendment would otherwise require in order to intervene before a probationer does damage to himself or society. The agency, moreover, must be able to proceed on the basis of its entire experience with the probationer, and to assess probabilities in the light of its knowledge of his life, character, and circumstances.

Id. at 879 (emphasis added).

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agents to search for weapons in common areas accessible to a convicted murderer. *Ohio v. Robinette*, 519 U.S. at ___, 117 S.Ct. at 421 (reasonableness is measured in objective terms by examining totality of circumstances).

Absent evidence that the search of Scott's residence was for a purpose unrelated to legitimate parole supervision, his consent to searches — as one of several permissible restrictions upon his behavior — was reasonable and entitled the state parole agents to search his home without a particular level of suspicion.

II. RELIABLE EVIDENCE SHOULD NOT BE EXCLUDED FROM CONSIDERATION BY PAROLE AUTHORITIES, EVEN IF THE EVIDENCE WAS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT.

The Pennsylvania Supreme Court has held that the Fourth Amendment requires application of the exclusionary rule to parole revocation proceedings. There is no need for the Court to address the exclusionary rule issue if, as we have argued in the preceding section, Scott's consent provided a proper basis for the parole agents' search of his residence. Even if Scott's consent did not authorize the search and the search did not meet a reasonableness standard, however, the Court should conclude that reliable evidence concerning a parole violation should not be excluded from consideration by parole authorities. The state supreme court's holding that application of the exclusionary rule is necessary in these circumstances should be reversed.

1. The Fourth Amendment, of course, "contains no provision expressly precluding the use of evidence obtained in violation of its commands. . . . " *United States v. Leon*, 468 U.S. 897, 906 (1984). The exclusionary rule, first applied to the federal government in *Weeks v. United States*, 232 U.S. 383 (1914), and much later to the States in *Mapp v. Ohio*, 367 U.S. 643 (1961), is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its

deterrent effect, rather than a personal constitutional right of the party aggrieved." *Id.*, *citing United States v. Calandra*, 414 U.S. 338, 348 (1974). The Court has stated that whether the exclusionary rule is appropriate in a particular case is a question "separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct,"[10] *Leon*, 468 U.S. at 906, and is to be resolved by "weighing the costs and benefits of preventing the use . . . of inherently trustworthy tangible evidence. . . . " *Id.* at 907.

The cost/benefit analysis has long been a source of concern to the Court. *Leon*, 468 U.S. at 907-08. In *Leon*, for example, the Court held that evidence obtained by police in reasonable reliance upon a defective search warrant should not be excluded from the criminal defendant's trial. 468 U.S. at 922. In so doing, the Court noted its longstanding concern over the "substantial social costs exacted by the exclusionary rule," *id.* at 907, and that an "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." *Ibid., quoting United States v. Payner*, 447 U.S. 727, 734 (1980).

While proposed extensions of the exclusionary rule to proceedings other than the criminal trial itself have been evaluated under the same cost/benefit approach, *Leon*, 468 U.S. at 909, the Court has restricted application of the rule to criminal trials and direct appeals, and has not extended it to exclude

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[10]We note Scott's argument below, J.A. 79a, 82a, apparently abandoned in this Court, Brief in Opposition to Petition, that the exclusionary rule should be applied to protect his mother's interest. Scott lacks standing to offer such an argument. *United States v. Payner*, 447 U.S. 727, 735 (1980).

evidence from a civil proceeding, federal or state. *Immigration and Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032, 1041-42 (1984). *See also Calandra*, 414 U.S. at 348 (declining to allow grand jury witness to refuse to answer questions based on unlawful search or seizure); *United States v. Janis*, 428 U.S. 433, 454 (1976) (permitting use in federal civil proceedings of evidence illegally seized by state officials). Indeed, even in a situation involving a criminal prosecution, the Court has rejected application of the rule to exclude evidence against a defendant where the evidence was obtained from a third person. *United States v. Payner*, 447 U.S. 727, 735 (1980).

Accordingly, "[a]s with any remedial advice," the application of the exclusionary rule "has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Leon*, 468 U.S. at 908, *quoting Calandra*, 414 U.S. at 348. The Court has acknowledged that "the suppression of probative but tainted evidence exacts a costly toll" upon the truth-finding process in criminal cases, *Payner*, 447 U.S. at 734, and thus has refused to adopt an "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude. . . ." *Ibid.*

2. The analysis of whether the rule should apply in a given situation thus focuses on the purpose underlying the rule, the deterrent effect of its application, and the societal costs of preventing use of the challenged evidence. *Leon*, 468 U.S. at 907-11. A proper application of the balancing approach required by the Court's decisions results in the conclusion that the exclusionary rule should not apply to parole revocation proceedings. As the Court noted in *Lopez-Mendoza*, the framework for determining in what types of proceedings application of the rule is appropriate is a balance of deterrence of unlawful police conduct against the "loss of often probative

evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs." 468 U.S. at 1041. While application of the rule may have some deterrent effect upon parole officers, it undoubtedly would interfere significantly with the State's ability to see that parole conditions are being met. Because evidence of a violation of parole conditions would be excluded by application of the rule, "the state's ability to protect society from additional antisocial acts committed by [parolees], and ultimately its ability to achieve the remedial purposes of the [parole] system, would be impaired." *United States v. Bazzano*, 712 F.2d 826, 834 (3d Cir. 1983) (in banc), *cert. denied sub nom. Mollica v. United States*, 465 U.S. 1078 (1984).

The Court has stated that empirical determinations of the deterrent effect of the exclusionary rule are of little help on the questions presented. *Janis*, 428 U.S. at 449-53. Thus, the Court instead has relied "on its own assumptions of human nature and the interrelationship of the various components of the law enforcement system." *Id.* at 459. In contrast to the police, parole agents under the circumstances of this case are not seeking to convict the parolee of new criminal offenses; therefore, application of the exclusionary rule in this situation would have no deterrent effect whatsoever on police behavior or a criminal prosecution. A parole revocation proceeding in Pennsylvania — as we suspect is the case in most jurisdictions — is not part of a criminal prosecution; and on the record of this case no police officers were involved and no criminal charges were brought against Scott. J.A. 110a, 137a. The Court's repeated concern about extending the exclusionary rule to situations other than criminal trials thus would be eroded by applying it here. In the absence of "convincing indication[s]" that such an extension is warranted, *Lopez-Mendoza*, 468 U.S. at 1046, the Court should adhere to its well-established framework and apply the

exclusionary rule sparingly. *Janis*, 428 U.S. at 454.

Balanced against the marginal deterrence that would be created by application of the rule is the "potential injury" to the purposes of parole revocation proceedings. *Calandra*, 414 U.S. at 349. In this regard, the Court has recognized that the State has a great interest in receiving all information available on the question whether the parolee has observed the conditions of his parole. As the Court stated in *Morrissey v. Brewer*,

> The State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty. Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts. Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.

408 U.S. at 483.

The costs to the States from application of the exclusionary rule to revocation proceedings are not limited to the specific *result* of exclusion of evidence in particular revocation hearings. As the Court has recognized, the government has an overwhelming interest in being able to return a parolee to imprisonment without the procedural burdens associated with a new trial if the parolee has failed to abide by the conditions of

parole. *Morrissey*, 408 U.S. at 480. Indeed, the Court repeatedly has stated that the decision to revoke probation or parole is an administrative one and is to be a flexible and informal process that "does not require the full panoply of procedural safeguards associated with a criminal trial." *Black v. Romano*, 471 U.S. 606, 613 (1985). *See also Gagnon v. Scarpelli*, 411 U.S. 778,787-90 (1973); *Morrissey*, 408 U.S. at 489-90. As the transcript of the revocation hearing in this case demonstrates, *e.g.*, J.A. 28a-29a, 60a, 67a, 110a, parolees and their counsel often attempt to equate the hearings with trials. To apply the exclusionary rule to what should be a purely administrative decision converts an informal, information-gathering proceeding into an adversarial trial and changes the role of the parole authorities to one "more akin to that of a judge at trial, and less attuned to the rehabilitative needs of the individual probationer or parolee." *Gagnon*, 411 U.S. at 787-88.

At bottom, the States' ability to protect the public from additional offenses committed by parolees, as well as to assure that parolees are reintegrating appropriately into society, should not be frustrated by the exclusion of relevant evidence. As a majority of the federal Courts of Appeals has recognized, Pet. at 9 n. 5, the exclusionary rule should not apply to parole revocation proceedings.

3. While acknowledging that this Court's decisions require a balancing approach, the Pennsylvania Supreme Court gave undue weight to the deterrent effect on the police in applying the exclusionary rule. Pet. App. 13a. Apparently seeing no distinction between the purposes of a criminal prosecution and the purposes of a parole revocation, *id.*, the state supreme court was persuaded by the reasoning of decisions where police officers conduct searches and the results are sought to be used both in probation revocation proceedings and in new

criminal trials. Pet. App. 13a.

In what only may be described as a myopic view of the situation, the state supreme court concluded that the balance tips in favor of the parolee — and thus in favor of applying the exclusionary rule — when the officer "knows or has reason to know that the suspect [*sic*] is a parolee or probationer." Pet. App. 15a. Such a crabbed view of the situation makes no sense, especially in a case such as this one. The state parole agents who went to Scott's home to conduct the search obviously knew he was a parolee; the very purpose for their detaining Scott and going to his home was to search for weapons, the possession of which was a violation of his parole conditions. J.A. 5a,83a. The application of the rule hardly should turn on whether parole agents "know" the person is a parolee. Indeed, in situations like the present case the agents *always* know the person is a parolee; otherwise, the agents would not be interested in his activities or what he may have in his residence.[11] The agents thus would be required always to have particularized suspicion or the results of

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[11]While not expressly so stating, the state supreme court apparently believed that police officers were involved — or that the parole agents were serving as "stalking horses" for the police — and that a criminal prosecution was brought against Scott along with a parole revocation proceeding. While some courts have expressed concern when the searching agents are police officers, rather than exclusively agents of an administrative board, *see United States v. Harper*, 928 F.2d 894, 897 (9th Cir. 1991), the Court has rejected the argument in the regulatory inspection context. *New York v. Burger*, 482 U.S. at 717 (so long as regulatory scheme is properly administrative, it is not rendered illegal by the fact that inspecting officer has power to arrest individuals for violations other than those created by scheme itself). In any event, no police officers were involved in this case and no criminal prosecution was brought against Scott.

the search would be excluded. As we have discussed above, this view fails to accord the proper weight to the States' interests in revocation proceedings and disregards the distinction between a criminal prosecution and a parole revocation.

The state supreme court's view thus is more medicine than is necessary. *Janis*, 428 U.S. at 454 n. 29. The existence of the exclusionary rule in criminal prosecutions protects parolees against new prosecutions based on unconstitutional searches; there is no need to blur the recognized distinctions between prosecutions and parole revocations especially where, as in this case, there was no attempt to prosecute the parolee criminally.

The decision of the Supreme Court of Pennsylvania that the exclusionary rule is applicable to parole revocation proceedings should be reversed.

CONCLUSION

For these reasons, the Court should reverse the judgment of the Supreme Court of Pennsylvania.

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PENNSYLVANIA BOARD OF PROBATION AND PAROLE,

Petitioner,

v.

KEITH M. SCOTT,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Pennsylvania

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QUESTIONS PRESENTED

1. Must a search of a parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to the searches as a condition of his parole?

2. Does the exclusionary rule apply to parole revocation proceedings?

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STATEMENT OF THE CASE

In addition to the facts set forth by petitioner, the Pennsylvania Board of Probation and Parole ("Board"), the following are material to consideration of the questions presented.

Respondent, Keith Scott ("Scott"), became eligible for parole consideration in 1993, having then served the ten year minimum portion of his sentence of ten to twenty years imprisonment. 61 Pa. Cons. Stat. Ann. § 331.21 (1964). After an investigation and consideration of the circumstances of his offense and his character and history (61 Pa. Cons. Stat. Ann. § 331.19 (1964)), parole was granted on August 25, 1993. J.A. 2a. However, release on parole was subject to his acknowledging that he agreed to follow the parole conditions set forth in Form PBPP-11, and any stated special conditions. J.A. 2a; 37 Pa. Code §§ 65.6 and 67.3. Among the conditions was an agreement to searches of his person and property by parole agents. Pet. App. 2a. On August 31, 1993, Scott signed the Conditions Governing Parole/Reparole form and was then released from prison on parole. J.A. 4a-8a; Pet. App. 30a n.3.

On February 4, 1994, a warrant to commit and detain Scott for violations of parole was issued by the Board (J.A. 9a) and he was arrested on that date in a diner by three parole officers, including his parole agent, Floyd Gallo. Pet. App. 2a. After seizing the key to Scott's home from him, the agents went to his house. J.A. 80a. Scott lived at home with his mother and stepfather, Mr. and Mrs. McDaniel. Pet. App. 2a. Only after being told by the agents that they were going to search Scott's room did

Mrs. McDaniel acquiesce and direct them there. Nothing was found in the search of his room, but during a search of an adjacent room, unloaded firearms were found. Scott was charged with possession of a firearm, a violation of parole. Pet. App. 3a.

On March 30, 1994, a hearing was held concerning the alleged violations of parole. J.A. 14a-18a. Scott's parole agent, Gallo, represented the Board and acted as prosecutor. His responsibilities included cross-examining Scott and his witnesses and presenting closing argument in support of a finding that the parole violations had been established. J.A. 94a-104a; 129a-131a.[1]

Agent Mundro testified at the hearing concerning the search of Scott's home. At the time of the search there was no regulation or statute in Pennsylvania concerning the authority or circumstances for parole agents to conduct searches of the homes of parolees. Pet. App. 31a. When asked by the hearing examiner what legal guidelines governed the search, the agent responded that the Board could search any parolee's approved residence. Pet. App. 4a.

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[1] One witness, Eric Hahn, called by Gallo to testify concerning certain alleged parole violations, had executed an affidavit which was introduced by the Board. Scott introduced a subsequent affidavit, D-1, "which indicated that his prior affidavit was executed under pressure by parole agents." Pet. App. 20a-21a. Hahn's subsequent affidavit alleged that Agent Gallo had told him and his son to "stretch the truth" and that Gallo had told him he never wanted Scott out of prison. Reproduced Record 103a; 140a. *See* J.A. 43a-45a.

Scott's parole was revoked on the basis of multiple violations, including possession of the firearms found in the search of his home. He was recommitted to serve 36 months in prison before becoming eligible for reparole. Pet. App. 5a. He has not been granted reparole.

Scott appealed to the Commonwealth Court of Pennsylvania. That court reversed and remanded for further proceedings. Pet. App. 39a. The Commonwealth Court concluded that the search of Scott's home violated the Fourth Amendment and that the exclusionary rule was applicable to his revocation hearing. Pet. App. 26a-37a.

The Board sought review in the Pennsylvania Supreme Court, which affirmed the judgment of the Commonwealth Court. The Pennsylvania Supreme Court concluded that there was no reasonable suspicion for the search of Scott's home by the parole officers. Pet. App. 10a. That conclusion has not been challenged here, nor was it ever claimed in the state courts that reasonable suspicion supported the search. The Board's sole claim for sustaining the validity of the search in the Pennsylvania courts and in its petition for a writ of certiorari to this Court was that Scott had consented to the search by signing the Conditions of Parole/Reparole form. In pertinent part, this form states:

> I expressly consent to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any items, in the possession of which constitutes a violation of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.
>
> Pet. App. 2a.

The Pennsylvania Supreme Court, relying exclusively on another Pennsylvania Supreme Court decision, construed this standard Pennsylvania parole conditions form as an acknowledgment by the parolee that the Board can, as stated in the form, conduct warrantless searches, but not that it also can conduct searches without reasonable suspicion. Pet. App. 9a-10a. Accordingly, the court held that the Fourth Amendment requires reasonable suspicion for a warrantless search of a parolee's home. Finding no reasonable suspicion for the search of Scott's home by his parole agent, it held that his Fourth Amendment rights were violated. Pet. App. 10a.

The Pennsylvania Supreme Court also concluded that the exclusionary rule should apply to revocation proceedings in those limited circumstances where the searching officer knows or has reason to know of the parolee's status. Pet. App. 14a-17a. It held that "there is a need to apply the exclusionary rule to the revocation process since otherwise there is nothing to deter a parole agent from conducting an illegal search or engaging in other illegal activity to obtain evidence." Pet. App. 15a.

This Court granted the Board's petition for a writ of certiorari, limited to its first question of whether the exclusionary rule applies to parole revocation proceedings. In addition, the parties were invited to brief and argue the following question: "Must a search of a parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole?" 118 S. Ct. 554 (1997).

SUMMARY OF ARGUMENT

1. Certiorari should be dismissed on the question of whether reasonable suspicion is required for the search of a parolee's home when he agrees to such a search as a condition of being released on parole. The search provision which was signed as a condition of parole stated only that it permitted warrantless searches. It did not provide for searches without reasonable suspicion. The record, therefore, does not present the issue.

The Pennsylvania Supreme Court construed the provision in accordance with Pennsylvania law to permit only warrantless searches, and not searches without reasonable suspicion. There is an adequate and independent state ground for the state court's interpretation of a state law administrative provision.

2. Consent to an otherwise unconstitutional parole search imposed as a condition for release from prison on parole is not voluntary. The price in this case for refusing to sign the search provision contained on the parole conditions form was ten more years in prison rather than release on parole. In true consent cases, where there is no coercion, an individual can refuse to consent without suffering substantial adverse consequences from the state.

The attempt to analogize the acceptance of the terms of parole release to plea bargaining fails as a matter of law and logic. The circumstances attendant to the signing of the parole conditions form manifest no form of bargaining, and the "bargaining chips" are all in the hands of the government.

This Court has already decided that the Fourth Amendment does not allow the search of a parolee's home in the absence of reasonable suspicion. The state may not condition receipt of a benefit, like parole, upon acceptance of an unconstitutional search condition. Otherwise, the state, rather than this Court, through the fiction of voluntary consent, would be the final authority on the reasonableness of searches under the Fourth Amendment.

3. The exclusionary rule has been applied in criminal trial proceedings to exclude evidence obtained by police as the result of unconstitutional searches. There is a significant deterrent value in that context given police law enforcement motivation and the lack of meaningful alternative remedies.

In this case parole agents, peace officers with police powers under state law, arrested a parolee for violating his parole conditions and then searched his home for evidence of violations of parole. The agents were performing a core law enforcement function and their primary zone of interest was the enforcement of parole conditions and the detection of violations. There are no meaningful alternative remedies to deter parole agents from conducting unconstitutional searches of the homes of parolees and their families.

The parole revocation proceeding will not be significantly burdened by permitting parolees to contest a search on the basis that there is no reasonable suspicion. The standard is the lowest under the Fourth Amendment, and the parties to the proceedings will only have to

understand and apply this uncomplicated Fourth Amendment concept.

The benefits clearly outweigh the costs of the exclusionary rule within this context. Without the sanction of exclusion, parole agents will be a law unto themselves. With no requirement of a warrant before they search the home of a parolee and his family and no exclusionary rule after the fact, there will be no oversight by a neutral authority. As a practical matter, the Fourth Amendment reasonable suspicion requirement will be a dead letter and millions of parolees and their families will be vulnerable to unlimited governmental intrusions into their homes.

ARGUMENT

I. BECAUSE THE RECORD DOES NOT PRESENT THE ISSUE AND BECAUSE THE DECISION OF THE COURT BELOW RESTS ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND – THAT THE PAROLE CONSENT FORM DOES NOT PERMIT SEARCHES WITHOUT REASONABLE SUSPICION – CERTIORARI SHOULD BE DISMISSED ON THIS QUESTION.

In *Griffin v. Wisconsin*, 483 U.S. 868 (1987), this Court held that a warrantless search of a probationer's home conducted pursuant to a state statutory framework which required reasonable grounds to believe that there was a probation violation did not violate the Fourth Amendment. *Id.*, at 872-73, 880. In granting certiorari, the Court invited the parties to brief the question of whether the Fourth Amendment nevertheless permits searches of a

parolee's home without reasonable suspicion where the parolee accepts parole on the condition he consents to such searches. This question assumes that the Fourth Amendment normally requires reasonable suspicion for a search of a parolee's residence and that the Pennsylvania parole consent form in fact expresses a consent by the parolee to a search without reasonable suspicion. However, because "the record does not fairly present the question that . . . [the Court] granted certiorari to address", *Rogers v. United States*, 118 S. Ct. 673, 677 (1998) (plurality opinion), certiorari should be dismissed as to this question. The parole condition at issue provides in pertinent part:

> "I expressly consent to the search of my person, property and residence without a warrant by agents of the Pennsylvania Board of Probation and Parole."
>
> Pet. App. 2a.

A condition which permits warrantless home searches does not, of course, automatically decide the separate question of what quantum of information the government must possess to justify the search. *See, e.g., Griffin v. Wisconsin, supra* (although no warrant necessary, reasonable grounds required for parolee home search pursuant to state regulation); *Terry v. Ohio*, 392 U.S. 1 (1968) (although no warrant required, police must have reasonable suspicion for stop and frisk); *Carroll v. United States*, 267 U.S. 132 (1925) (although no warrant required, car search only permissible with probable cause). The plain language of the search condition, as drafted by the Board, does not inform the parolee that searches may be made by parole agents without reasonable suspicion.

In *Minnesota v. Murphy*, 465 U.S. 420 (1984), even in the absence of any state court guidance, this Court refused to construe a state probation condition to waive Fifth Amendment rights where the purported waiver was not explicitly stated. The condition there required a probationer to be truthful with his probation officer "in all matters." *Id.*, at 422. "Without the benefit of an authoritative state-court construction of the condition, we are hesitant to read into the truthfulness requirement an obligation that Murphy refrain from raising legitimate objections to furnishing information that might lead to his conviction for another crime." *Id.*, at 437.

Here, too, there is no justification for reading into Scott's parole condition an additional provision requiring him to waive a constitutional right. Consistent with this Court's practice of "avoiding the unnecessary or premature adjudication" of constitutional issues, *Rogers v. United States*, 118 S. Ct. 673, 676 (1998) (plurality opinion), certiorari should be dismissed.

Certiorari should also be dismissed because the interpretation of this state regulatory provision is within the sole province of the Pennsylvania courts, and here, unlike *Murphy*, the state supreme court did construe the state law provision. The Pennsylvania Supreme Court looked only to its decision in *Commonwealth v. Williams*, 692 A.2d 1031 (Pa. 1997), to resolve the question of the construction of the parole search provision. Pet. App. 7a. It followed and quoted *Williams*:

> [T]he parolee's signature acts as acknowledgment that the parole officer has a right to conduct reasonable searches of his residence listed

> in the parole agreement without a warrant. Op. [*Williams*] at ___, 692 A.2d at 1036.
>
> * * *
>
> We went on to say that a search will be deemed reasonable if . . . the parole officer had a reasonable suspicion.

Pet. App. 9a-10a.

Thus, the Pennsylvania Supreme Court relied exclusively on Pennsylvania law to construe the meaning of this state law parole regulation. The Board does not dispute that the Pennsylvania Supreme Court's construction of the search condition provision was an independent state law interpretation. To the contrary, it complains only that the Pennsylvania Supreme Court "distorts the plain meaning of the provision, . . . [and] fails to afford the deference due those who administer a vital part of the State's penological system." Brief for Petitioner 23. The Board thus loses sight of what this Court said in *Griffin*. "Whether or not we would choose to interpret a similarly worded federal regulation in that fashion, we are bound by the state court's interpretation, which is relevant to our constitutional analysis only insofar as it fixes the meaning of the regulation." *Griffin*, 483 U.S. at 875. Indeed, "it would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law." *Stringer v. Black*, 503 U.S. 222, 235 (1992).

In addition to *Commonwealth v. Williams, supra*,[2] the decision below is fully consistent with previous rulings of

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[2] *Williams* looked to Fourth Amendment considerations, Pennsylvania law and other states for guidance before deciding

the Pennsylvania Supreme Court interpreting the state law of consent. As a matter of state law, the Pennsylvania Supreme Court requires that "in order for consent to an otherwise illegal search to be valid, the consent must be unequivocal, specific, and voluntary." *Commonwealth v. Gibson*, 638 A.2d 203, 207 (Pa. 1994). The parole condition search provision neither specifically nor unequivocally allows searches without reasonable suspicion. Indeed, there is no suggestion whatsoever in the form that such searches would be permitted. And, as a matter of statutory construction, the Pennsylvania Supreme Court has long held that it will not "supply omissions in a statute." *E.g., Panik v. Didra*, 88 A.2d 730, 733 (Pa. 1952); *Kusza v. Maximonis*, 70 A.2d 329, 331 (Pa. 1950).

Given Pennsylvania's construction of its own state provision on state law grounds, there is an adequate and independent state ground for its decision. *Michigan v. Long*, 463 U.S. 1032 (1983). Coupled with the fact that the parole condition does not provide for suspicionless searches, this case is a particularly poor vehicle to answer the question of whether a parolee can consent to searches

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on its state law interpretation of the consent provision, 692 A.2d at 1036-37, and, to the extent that the Pennsylvania Supreme Court in *Williams* considered both Fourth Amendment and state constitutional principles on some of the claims in that case, it ultimately made an independent analysis under Art. I, Sec. 8 of the Pennsylvania Constitution. 692 A.2d at 1038-39. Thus, even if, as suggested by the Brief for the United States at 24 n.6, that *Williams* is somehow relevant to the nature of the decision made in this case by the Pennsylvania Supreme Court, there still exists an independent state law basis for the decision. Of course, the judgment in *Williams* is not before this Court.

without reasonable suspicion.[3] Certiorari should be dismissed as to this question.

II. WHEN RELEASE FROM PRISON ON PAROLE IS DEPENDENT ON AGREEING TO AN OTHERWISE UNCONSTITUTIONAL SEARCH CONDITION, ACCEPTANCE DOES NOT CONSTITUTE VOLUNTARY CONSENT

Assuming that Scott's parole condition purports to authorize searches without reasonable suspicion, this Court should hold that Scott did not voluntarily consent to that parole condition. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), a case not discussed by the Board, provides the framework for analysis of the issue of consent. *See, e.g., Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996); *United States v. Mendenhall*, 466 U.S. 544, 557-58 (1980).

The Board and amici argue that the circumstances under which Scott signed the parole search consent form were not coercive in a constitutional sense and that his choice to "consent" to searches without a warrant and without reasonable suspicion is one that is tolerated by the Constitution. There are fundamental flaws in these

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[3] The situation will not arise again in Pennsylvania regardless of this Court's decision. Subsequent to the search in this case, the legislature enacted a provision permitting parole agent searches "in accordance with the provisions of this section." 61 Pa. Cons. Stat. Ann. § 331.27a.(b) (Supp. 1997). The Act further provides that reasonable suspicion is required for the search of a parolee's home, and has been so construed by the Pennsylvania Supreme Court. 61 Pa. Cons. Stat. Ann. § 331.27a.(d)(2), (g) (Supp. 1997); *Commonwealth v. Williams*, 692 A.2d 1031, 1035 n.9 (1997).

arguments. First, under the established test for determining whether consent is voluntary, articulated in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), there can be no finding that the decision to sign the form was the result of an "essentially free and unconstrained choice." *Id.*, at 225. For the potential parolee, a refusal to sign means years more in custody rather than freedom. In related contexts, this Court has not accepted the fiction of consent. When the government conditions receipt of a benefit on an agreement to surrender constitutional rights, this Court has consistently found that the situtation is coercive. Second, the attempt to analogize the acceptance of the terms of parole release to plea bargaining fails as a matter of law and logic. We will show that the circumstances attendant to the signing of the parole conditions form involve no bargaining, and that the "bargaining chips" are all in the hands of the government. Third, the Court has determined the legitimacy of an invasion of privacy mandated by the government under the Fourth Amendment's "reasonableness" test, an inquiry that requires the applicable balancing of interests. Thus, the government may condition certain benefits or entitlement on the reciprocal power to search only if, considering all of the factors, the search is reasonable. A reasonableness test here would require that a search of a parolee's residence be supported by reasonable suspicion.

A. The Schneckloth Voluntariness Test: Where Saying No To The Unconstitutional Parole Search Condition Would Result In Ten More Years In Prison, Acceptance Does Not Constitute Voluntary Consent.

The Government "has the burden of proving that the consent was, in fact, freely and voluntarily given." *Schneckloth*, 412 U.S. at 222 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). This Court observed that the question is one of whether there is an "essentially free and unconstrained choice." *Id.*, at 225. Considering the totality of the circumstances, the test is whether "a search was in fact 'voluntary' or was the product of coercion, express or implied." *Id.*, at 227. This Court emphasized in *Schneckloth* that the defendant there was not in custody (*Id.*, at 248), and "that other courts have been particularly sensitive to the heightened possibilities for coercion when the 'consent' to a search was given by a person in custody." *Id.*, at 241 n.29.

Further, in assessing the totality of the circumstances, consideration must be given to "the possibly vulnerable subjective state of the person who consents." *Schneckloth*, 412 U.S. at 229. It is clear that when liberty is at stake, the pressures on an individual making a decision are particularly powerful. Thus, in *Minnesota v. Murphy*, 465 U.S. 420 (1984), this Court had little difficulty concluding that if a probation condition required waiver of the privilege against self-incrimination, the state "would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution." *Id.*, at 435 (footnote omitted). In

United States v. Watson, 423 U.S. 411 (1976), this Court determined that an individual who had just been arrested had voluntarily consented to a search of his car. *Id.*, at 425. The defendant was "on a public street, not in the confines of a police station," *id.*, at 424, and "[t]here were no promises made to him and no indication of more subtle forms of coercion that might flaw his judgment." *Id.*, at 424.

There was nothing subtle about the coercion inherent in Scott's situation. He had been in prison for ten years when he became eligible under Pennsylvania law to apply for parole on his ten to twenty year sentence. 61 Pa. Cons. Stat. Ann. § 331.21 (1964). The decision to grant or deny parole is discretionary after an application is filed. 61 Pa. Cons. Stat. Ann. § 331.22 (1964). *See, e.g., Weaver v. Pennsylvania Board of Probation and Parole*, 688 A.2d 766 (Pa. Commw. Ct. 1997) (en banc). In this case, after the appropriate investigation, 61 Pa. Cons. Stat. Ann. § 331.19 (1964), Scott was approved for parole on August 25, 1993, with an actual release date of September 1, 1993. J.A. 2a-3a. As a potential parolee, Scott would not attain the actual status of parolee (and his release from prison) unless he signed the form containing the conditions of parole, including the search condition at issue here. 37 Pa. Code §§ 65.6 and 67.3. *See Shaw v. Pennsylvania Board of Probation and Parole*, 671 A.2d 290, 292 (Pa. Commw. Ct. 1996), *appeal denied*, 690 A.2d 1165 (Pa. 1997); *Johnson v. Commonwealth, Pennsylvania Board of Probation and Parole*, 532 A.2d 50, 52 (Pa. Commw. Ct. 1987).

Thus, the price of saying no to the government's search condition was ten more years of imprisonment for Scott. For good reason, Professor LaFave has concluded

that "to speak of consent in this context is to resort to a manifest fiction." 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.10(b) at 764 (3d Ed. 1996).[4] In true consent to search cases, where this Court has found that the Government met its burden of showing an absence of coercion, *see, e.g., United States v. Mendenhall*, 446 U.S. 544, 557-58 (1980); *United States v. Watson*, 423 U.S. 411, 424-25 (1976), there is the free and unconstrained choice to say no to the government without adverse consequences from the government directly following as a result of that decision.[5]

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[4] Some courts have reached the same conclusion. *See, e.g., United States ex rel. Coleman v. Smith*, 395 F. Supp. 1155 (W.D.N.Y. 1975); *Dearth II v. State*, 390 So.2d 108 (Fla. Dist. Ct. App. 1980); *Tamez v. State*, 534 S.W. 2d 686, 691-92 (Tex. 1976).

[5] In less inherently coercive circumstances, federal circuit courts have correctly refused to indulge the fiction that an individual voluntarily consented to a government search when a search was required as a condition of engaging in an activity and the person still chose to do the activity. *E.g., McGann v. Northeast Illinois Regional Commuter R.R. Corp.*, 8 F.3d 1174, 1179-1181 (7th Cir. 1993) (parking in government garage with notice that cars parked there are subject to search); *Blackburn v. Snow*, 771 F.2d 556, 567-69 (1st Cir. 1985) (entering prison to visit relative after signing required form consenting to strip search); *United States v. Albarado*, 495 F.2d 799 (2d Cir. 1974) (choosing to board airplane with notice that magnetometer search necessary to do so). In each of these cases the court held that whether the search complied with the Fourth Amendment should be judged on the reasonableness of the government's actions. Likewise, this Court has noted that searches at airports and entrances to courts are reasonable, and therefore constitutional, because of the public safety concerns involved, not on a theory that there is voluntary consent. *Chandler v. Miller*, 117 S. Ct. 1295, 1305 (1997). *See also National Treasury Employees v. Von Raab*, 489 U.S. 656, 675 n.3 (1989).

Even where freedom is not at stake, and the individual is threatened only with adverse economic consequences, this Court has recognized the inherent coercion and a lack of voluntariness associated with the purported consent.

Eighty years ago, finding a Commerce Clause violation, the Court rejected the argument that a corporation's application to a government agency for a needed certificate was "voluntary," and that therefore there could be no complaint about the fee charged for the certificate which was found by this Court to be unconstitutional. *Union Pac. R.R. Co. v. Pub. Service Comm.*, 248 U.S. 67, 69 (1918). "Were it otherwise, as conduct under duress involves a choice, it always would be possible for a state to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary . . . " *Id.*, at 70.

Likewise, in *Garrity v. New Jersey*, 385 U.S. 493 (1967), where a police officer answered questions after he was threatened with losing his job if he did not answer, the Court held that incriminating answers were obtained in violation of the officer's constitutional right against self-incrimination. *Id.*, at 498-500. "We think the statement was infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions." *Id.*, at 498-99 (footnotes omitted). This Court has consistently held that "a waiver secured under threat of substantial economic sanction cannot be termed voluntary." *Lefkowitz v. Turley*, 414 U.S. 70, 82-83 (1973) (provision which requires independent contractors to waive Fifth Amendment rights in return for having contracts with the government is unconstitutional).

Most recently, this Court found a First Amendment violation where an independent contractor was denied the opportunity to do business with the government because he had refused demands to provide political support. *O'Hare Truck Service, Inc. v. City of Northlake,* 116 S. Ct. 2353, 2358 (1996). ("We see nothing to distinguish this from the coercion exercised in our other unconstitutional conditions cases").

Scott's choice to sign the parole search condition was not made in the absence of governmental coercion.

B. There Is No Bargaining Process – It is Take It (The Unconstitutional Search Condition) or Leave It (And Remain In Prison)

Amici urge this Court to find voluntariness here by asserting that the signed Conditions of Parole form is no different than a defendant choosing to accept a guilty plea agreement with the government. *See, e.g.,* Brief for the United States 9-10, 22-28; Brief for the Criminal Justice Legal Foundation 12-13, 18-20. There are several significant features which distinguish the two situations and which demonstrate the inaptness of the analogy.

In the plea bargaining context, there is a "give-and-take negotiation . . . between the prosecution and defense, which arguably possess relatively equal bargaining power." *Bordenkircher v. Hayes,* 434 U.S. 357, 362 (1978). "[B]ecause each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained for exchange." *Ricketts v. Adamson,* 483 U.S. 1, 9 n.5 (1987) (quoting *Mabry v. Johnson,* 467 U.S. 504, 508 (1984)).

A defendant can use his "bargaining chips" to "maximize what he has to sell." *United States v. Mezzanatto,* 513 U.S. 196, 208 (1995). What a defendant has to sell sometimes includes information, and always includes his constitutional rights. The defendant's constitutional right to insist on a trial gives her the bargaining chip of offering the prosecutor the opportunity to have "scarce judicial and prosecutorial resources . . . conserved" by avoiding trial with a plea agreement. *Brady v. United States,* 397 U.S. 742, 752 (1970). More importantly, since the constitutional right to insist that a factfinder be convinced beyond a reasonable doubt will lead to acquittal in some cases, the bargain gives the prosecutor the certainty of obtaining a guilty verdict and a sentence.

This is a true bargaining process. Defendants often turn down plea agreements when, upon consultation with their attorneys, they conclude that a trial is the better alternative. If an agreement is reached, constitutional procedural safeguards ensure that the plea agreement is knowing, intelligent and voluntary. *Boykin v. Alabama,* 395 U.S. 238 (1969). Significantly, the agreement, once accepted by the court, is binding on both parties, and the government has no unilateral power to change its conditions. *Santobello v. New York,* 404 U.S. 257 (1971).

Scott's acceptance of the search condition bears no relationship to the plea bargain process. *See Brady v. United States,* 397 U.S. 742, 750 (1970) (distinguishing plea agreements from promises of leniency to uncounseled defendants in custody who are questioned). The potential parolee has no counsel and there are no proceedings in open court or otherwise. There is no bargaining and no give and take. Unlike the untried defendant, the inmate

approved for parole has nothing to sell; he has no bargaining chips. There are no constitutional rights he can rely on to bargain with the government.

When the parole conditions form (with the waiver of his Fourth Amendment rights) is put in front of him, the inmate has the choice only to sign and go home, or to refuse and remain in prison. Unlike the defendant in a criminal prosecution who may do better by rejecting a plea agreement and taking his chances at trial, there is the certainty here of more years of confinement if he refuses. The inmate will opt for his freedom.

The signing of the parole conditions sheet constitutes nothing more than the inmate's acknowledgment of notice and receipt of the unilateral restrictions imposed on his life if he is released.[6] It is not an agreement in any sense of the word; unlike a plea bargain, the conditions can be unilaterally changed by the government later if the inmate is released on parole. *See* 37 Pa. Code § 63.5(a) ("Parolees shall comply with special conditions which are imposed by the Board or which are subsequently imposed by the parole agent.").[7]

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[6] That is why the document signed by the parolee is not labeled a "parole agreement". It is a "Conditions Governing Parole/Reparole" form. J.A. 4a. "[T]he prisoner signs an acknowledgment of the conditions of parole." *Shaw v. Pennsylvania Board of Probation and Parole*, 671 A.2d 290, 292 (Pa. Commw. Ct. 1996) (footnote omitted), *appeal denied*, 690 A.2d 1165 (Pa. 1997).

[7] For the same reasons, acceptance of parole conditions is not a contract between two parties. *See Vermont v. Lockwood*, 632 A.2d 655, 658 (Vt. 1993). *See and compare, Zap v. United States*, 328 U.S. 624 (1946). In sustaining a search provision contained in a

In essence, the Board's argument must be that Scott's act of signing the parole conditions sheet was voluntary and uncoerced because he had the opportunity to refuse. *Schneckloth* rejected that simplistic analysis – "[e]xcept where a person is unconscious or drugged or otherwise lacks capacity, all choices can be termed 'voluntary' in the sense of representing a choice of alternatives." "Schneckloth, *supra*, 412 U.S. at 224. Because an individual, in order to gain his freedom, is willing to accept unconstitutional conditions which would otherwise violate Fourth Amendment rights and seriously compromise his and his family's rights of privacy does not make the choice voluntary in the constitutional sense.

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contract between the government and a contractor this Court spoke of waiver of Fourth Amendment rights but ultimately did not decide "the limits of that power" because it concluded that the search was reasonable. *Id.*, at 628. Subsequent cases in the Fourth and Fifth Amendment contexts have made clear that the limits of government power are to be determined by the constitutionality of the government provision, and not on a theory of voluntary consent. *E.g., Lefkowitz v. Turley*, 414 U.S. 70 (1973) (public contracts requiring contractor to waive Fifth Amendment rights are unconstitutional); *United States v. Biswell*, 406 U.S. 311, 315 (1972) (regulatory schemes should be evaluated based on validity of the statute, not a consent theory).

C. This Court's Role In Determining Fourth Amendment Reasonableness Will Be Transferred To The Executive Branch If the Government Can Require Unconstitutional Search Conditions To Be Accepted In Return For Benefits.

This Court's Fourth Amendment jurisprudence in cases, like the one at bar, where the government requires an individual to submit to a search or seizure either directly under the government's asserted power to do so or as a condition of some benefit or program, derives most fundamentally from the Fourth Amendment's reasonableness provision. Thus, for example, in deciding whether compelled drug testing, *e.g., Chandler v. Miller,* 117 S. Ct. 1295 (1997), home visits for welfare recipients, *Wyman v. James,* 400 U.S. 309 (1971), automobile stops, *e.g., Delaware v. Prouse,* 440 U.S. 648 (1979), or administrative searches, *e.g., New York v. Burger,* 482 U.S. 691 (1987), are constitutional, the Court has not indulged in the fiction that the individual has "consented" to the governmental demand.[8] Rather, the analysis has focused on the traditional Fourth Amendment balancing of the interests of the government and the individual in determining the overall reasonableness of the governmental conduct. Not surprisingly, the outcome differs with the relative weight given to the interests. We believe that the Court has already answered this question in the context of parole

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[8] *See, e.g., United States v. Biswell,* 406 U.S. 311, 315 (1972) ("In the context of a regulatory inspection system of business premises that is carefully limited in time, place and scope, the legality of the search depends not on consent but on the authority of a valid statute.").

searches (requiring reasonable suspicion, but no warrant), and that the issue is not presented in this case. However that question is resolved, it ought to be on the merits of the constitutional issue, and not on the fiction of consent. *See* Section D, *infra,* 24-29.

Application of a consent theory will result in a wholesale transfer to the executive branch of this Court's constitutionally mandated prerogative of deciding what the Constitution requires. *See, e.g., City of Boerne v. Flores,* 117 S. Ct. 2157, 2172 (1997). Where, as here, there can be no voluntary consent under established Fourth Amendment doctrine, expansion of the consent doctrine to all cases in which an individual who has no bargaining power accepts a governmental demand at the price of his liberty or other constitutional rights, will negate this Court's responsibility to determine the reasonableness of searches and seizures. If the action of Scott here is considered consensual and this Court therefore determines that a reasonableness inquiry is not necessary, what would prevent the government from requiring applicants for driver's licenses to agree to suspicionless stops or searches of their cars, candidates for public office to agree to searches of their offices or bodies, welfare recipients to agree to full searches of their homes, or any licensed business to agree to any type of search or seizure of its premises? We do not mean to suggest that in any of these circumstances or the scores of other similar hypothetical situations, that the government could never prevail on a "reasonableness" analysis. Rather, acceptance of the consent theory pretermits this analysis and renders all Fourth Amendment rights vulnerable to executive branch mandates.

This Court should reject such a radical change in Fourth Amendment jurisprudence.

D. Reasonable Suspicion Should Continue To Be Required For The Search Of A Home Of A Parolee And His Family.

The Board's principal argument is that even in the absence of voluntary consent by a parolee, the Fourth Amendment should permit "state parole agents to search his home without a particular level of suspicion." Brief for Petitioner 26. Counsel does not construe this Court's grant of certiorari as encompassing this issue but, out of an abundance of caution, it will be briefly addressed.

In essence, the Board requests this Court to overrule *Griffin v. Wisconsin*, 483 U.S. 868 (1987). In *Griffin*, this Court left unanswered the question of whether reasonable suspicion without a regulatory framework would permit a search of a probationer's home, while holding that the Wisconsin statutory scheme which required such searches to be based on reasonable grounds did comport with the Fourth Amendment. *Id.*, at 872, 880. The Wisconsin regulations specified the types of information that the searching officer should consider in determining whether reasonable grounds were present. *Id.*, at 878-79.

This Court rejected the probable cause standard in *Griffin* because it concluded that "the probationer would be assured that so long as his illegal (and perhaps socially dangerous) activities were sufficiently concealed as to give rise to no more than reasonable suspicion, they would go undetected and uncorrected." *Id.*, at 878. It further noted that the search "should be supportable by a

lesser quantum of concrete evidence justifying suspicion than would be required to establish probable cause." *Id.*, at 879 n.8. The dissenting Justices also agreed that the special needs of a probation system "may justify a search by a probation officer on the basis of a "reasonable suspicion". *Id.*, at 881. *Griffin* has been understood by lower courts as requiring reasonable suspicion to search the home of a probationer or parolee.[9]

There has been no showing that "a special need" has now developed for states to conduct full searches of the homes of probationers and parolees without reasonable suspicion, rather than use alternative methods to monitor their activities.[10] This case involves a full blown search of a parolee's home for evidence of parole violations. It stands in stark contrast to a home visit. "Homes can be

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[9] *See, e.g., United States v. Lewis*, 71 F.3d 358, 362 (10th Cir. 1995); *Vermont v. Lockwood*, 632 A.2d 655, 662 (Vt. 1993); *United States v. Gianetta*, 909 F.2d 571, 575-76 (1st Cir. 1990); *United States v. Schoenrock*, 868 F.2d 289, 292 (8th Cir. 1988).

[10] "[M]ethods of supervision used by agents in order to monitor the actions of parolees . . . include: field contacts: . . . collateral contacts: . . . telephone contacts: . . . group supervision contacts: . . . [and] office contacts. . . . " Pennsylvania Board of Probation and Parole, *Fact Sheet* (Administrative Office 1997). After reviewing those means available for parole agents to investigate the parolee in society, Professor White concluded that "no compelling need can be shown to justify such [home] searches." Welsh S. White, *The Fourth Amendment Rights of Parolees and Probationers*, 31 U. Pitt. L. Rev. 167, 194 (1969).

In addition, the parolee has no constitutional right to refuse to answer, or not to answer truthfully, questions concerning possible probation or parole violations. *Minnesota v. Murphy*, 465 U.S. 420, 435-36 n. 7 (1984).

visited without embarrassment to occupants." David Dressler, *Practice and Theory of Probation and Parole* 254 (2d Ed. 1969). In *Wyman v. James*, 400 U.S. 309 (1971), this Court upheld as reasonable a statute which permitted home visits to gather information concerning welfare recipients, carefully contrasting home visits with those cases involving "a true search for violations." *Id.*, at 325.

Indiscriminate intrusions into a parolee's home undercut the ability of the parolee to develop a stable home life and to reintegrate into society. They can be detrimental to the relationship between the parolee and the agent, and they demonstrate that a parolee is not to be treated with respect in his own home no matter how exemplary a life he lives.[11] Treating the parolee fairly in a non-arbitrary manner also benefits society because it "will enhance the chance of rehabilition by avoiding reactions to arbitrariness." *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972). Intrusions into the home also seriously compromise the privacy of any family members or others

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[11] *See, e.g.*, William R. Rapson, Note, *Extending Search-and-Seizure Protection to Parolees in California*, 22 Stan. L. Rev. 129, 140 (1969); Joan D. Kleinman, Note, *Guess Who's Coming To Dinner: A Critical Look At Home Visits By Parole Officers*, 14 Colum. Hum. Rts. L. Rev. 355, 381 (1982-83); Comment, *The Parole System*, 120 U. Pa. L. Rev. 284, 336-37 (1971). Justice O'Connor has made this point generally about the value of a reasonable suspicion standard. "Searches based on individualized suspicion also afford potential targets considerable control over whether they will, in fact, be searched because a person can avoid such a search by not acting in an objectively suspicious way." *Vernonia School District v. Acton*, 515 U.S. 646, 667 (1995) (O'Connor, J., dissenting).

with whom the parolee is living.[12] Millions of people not on parole or probation could also be subjected to suspicionless home searches. *See* U.S. Dept. of Justice, Bureau of Justice Statistics, *Correctional Populations in the United States*, 1995 iii (1997) (3.8 million people on probation or parole).

This is not to denigrate the legitimate concern for the risk of recidivism on the part of parolees. However, parolees have been found fit for release into society before completion of their maximum sentences. Those found unfit for release and who serve their entire sentences before being released are at least as likely to pose a risk, yet they cannot be stopped and frisked on the street without reasonable suspicion, *Terry v. Ohio*, 392 U.S. 1 (1968), and their homes cannot be entered without probable cause and a warrant. *See, e.g., Payton v. New York*, 445 U.S. 573 (1980). There is a limited and "closely guarded category of constitutionally permissible suspicionless searches." *Chandler v. Miller*, 117 S. Ct. 1295, 1298 (1997). Except for the prison setting, "a unique place fraught with serious security dangers", *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), suspicionless searches have been tolerated only when there has been an important government interest and the intrusion is a "negligible" invasion of privacy. *Vernonia School District v. Acton*, 515 U.S. 646, 658

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[12] This in turn could cause serious problems for the person found suitable for release who needs an approved home plan. A parolee may lose the opportunity for parole or to continue on parole simply because others, who would otherwise welcome him into their home, refuse to do so because they are not willing to tolerate full searches of their homes without reasonable grounds.

(1995). As this Court has recognized, the parolee's "condition is very different from that of confinement in a prison." *Young v. Harper,* 117 S. Ct. 1148, 1152 (1997) (quoting *Morrissey v. Brewer,* 408 U.S. 471, 482 (1972)).

This Court has emphasized that "at the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusions." *Payton v. New York,* 445 U.S. 573, 589-90 (1980) (quoting *Silverman v. United States,* 365 U.S. 505, 511 (1961)). Business regulatory cases relied on by the Board, Brief for Petitioner 22, 23, are inapposite because "an expectation of privacy in commercial premises . . . is different from, and indeed less than a similar expectation in an individual's home." *New York v. Burger,* 482 U.S. 691, 700 (1987). *Griffin* recognized that "[a] probationer's home, like anyone else's, is protected by the Fourth Amendment requirement that searches be reasonable." *Griffin,* 483 U.S. at 873. An objective quantum of proof, as required by *Griffin,* should not be abandoned in favor of leaving parolees and their families "subject to unfettered governmental intrusion", *Delaware v. Prouse,* 440 U.S. 648, 662 (1979), into their homes.

The constitutional test proposed by the Board asks only whether the "search was for a purpose unrelated to legitimate parole supervision." Brief for Petitioner 13-14, 26. But this standard imposes no limit at all since the entry and search can always be justified as a check on compliance with parole conditions. Further, the government already has broad ranging powers under the reasonable suspicion standard where the "showing [required] is not high." *Richards v. Wisconsin,* 117 S. Ct. 1416, 1422 (1997).

If the Court reaches this issue it should hold that the Fourth Amendment requires reasonable suspicion for a search of a parolee's home. And, because there was a finding of no reasonable suspicion here, and there was no voluntary consent to home searches without reasonable suspicion, the Pennsylvania Supreme Court's holding that the search violated the Fourth Amendment should be affirmed.

III. THE EXCLUSIONARY RULE SHOULD APPLY TO EXCLUDE EVIDENCE IN PAROLE REVOCATION PROCEEDINGS OBTAINED AS THE RESULT OF UNCONSTITUTIONAL SEARCHES BY PAROLE AGENTS.

In order to ensure that the Fourth Amendment would not be "an empty promise", the Court held in *Mapp v. Ohio,* 367 U.S. 643, 660 (1961), that evidence obtained from an individual by police in violation of the Fourth Amendment must be excluded from that person's criminal trial. The exclusionary rule has also been applied to forfeiture proceedings where the proceedings were designed to punish the individual for criminal conduct. *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 700-01 (1965). *See also United States v. James Daniel Good Real Property,* 510 U.S. 43, 49 (1993).

Because the exclusionary rule is not viewed as a personal constitutional right, but instead is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect", *United States v. Leon,* 468 U.S. 897, 906 (1984) (quoting *United States v. Calandra,* 414 U.S. 338, 348 (1974)), this Court has

held that it is constitutionally required only "where its remedial objectives are thought most efficaciously served." *Arizona v. Evans,* 514 U.S. 1, 11 (1995). Accordingly, "where the exclusionary rule does not result in appreciable deterrence, then clearly its use . . . is unwarranted." *Id.* (quoting *United States v. Janis,* 428 U.S. 433, 454 (1976)). This Court has refused to apply the exclusionary rule to proceedings where the deterrent value would be "marginal", for example where the police search was not motivated in any meaningful way by the potential outcome of that proceeding. *See, e.g., United States v. Janis,* 428 U.S. 433, 453, 455 (1976) (another sovereign's civil tax proceeding); *United States v. Calandra,* 414 U.S. 338, 342 (1974) (grand jury proceeding); *Stone v. Powell,* 428 U.S. 465, 493 (1976) (federal habeas corpus proceedings).

Likewise, significant deterrence of police unconstitutional action is absent when police reasonably rely on another state actor in deciding to conduct the search. *United States v. Leon,* 468 U.S. 897 (1984) (warrant issued by neutral and detached magistrate); *Illinois v. Krull,* 480 U.S. 340 (1987) (statute passed by legislature); *Arizona v. Evans,* 514 U.S. 1 (1985) (computer arrest records prepared by court clerks). Of course, since these other state actors were ultimately responsible for the unconstitutional searches which occurred, the exclusionary rule was not applied only after examining their role in such searches. In each instance, they were viewed as completely neutral, as the magistrates (*Leon*) and court clerks (*Evans*), or at least, as the legislators in *Krull,* not "adjuncts to the law enforcement team." *Krull,* 480 U.S. at 350-51 (quoting *Leon,* 468 U.S. at 917).

The only case decided by this Court directly addressing the question of whether evidence should be excluded at a proceeding where police did not conduct the search and seizure is *INS v. Lopez-Mendoza,* 468 U.S. 1032 (1984). The Court ruled that the exclusionary rule should not be applied to exclude evidence seized by INS agents for deportation proceedings but recognized the crucial difference between that situation and one such as that presented by *Janis,* where the exclusionary rule already operates in criminal proceedings to deter the police:

> "[T]he arresting officer's primary objective, in practice, will be to use evidence in the civil deportation proceeding. Moreover, here, in contrast to *Janis,* the agency officials who effect the unlawful arrest are the same officials who subsequently bring the deportation action. As recognized in *Janis,* the exclusionary rule is likely to be most effective when applied to such 'intra sovereign' violations."

Id., 468 U.S. at 1043.

However, on balance, in *INS* the exclusionary rule was held not to apply in deportation proceedings for several reasons not applicable here. First, it was a purely civil proceeding not involving punishment. Second, the INS was a single government agency which had the capacity to deter Fourth Amendment violations, and had done so through Fourth Amendment training programs, and punishment of officers for Fourth Amendment violations. Third, the illegal alien's very presence in this country was a continuing offense. *Id.,* 1043-1047.

Applying these factors, parole agent searches and parole revocation proceedings, with their potential for

loss of liberty and criminal punishment, should be subject to the exclusionary rule. "The need for deterrence and hence the rationale for excluding the evidence is strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." *United States v. Calandra*, 414 U.S. 338, 348 (1974) (footnote omitted). As will be demonstrated, the parole agent search is in essence a law enforcement function. Its primary objective is to gather evidence for use against the parolee at revocation proceedings and, unlike *INS*, there are no effective alternative remedies to deter unconstitutional parole agent searches of the homes of parolees and their families.

A. A Parole Agent Search For Evidence Of Parole Violations Is A Law Enforcement Function.

This Court has observed that in general a parole officer's job, with its search and arrest powers, has a significant law enforcement aspect. The parole or probation officer "is a peace officer, and as such is allied to a greater or lesser extent, with his fellow peace officers." *Minnesota v. Murphy*, 465 U.S. 420, 432 (1984) (quoting *Fare v. Michael C.*, 442 U.S. 707, 720 (1979)). *See Cabell v. Chavez-Salido*, 454 U.S. 432, 443-44 (1982) ("The general law enforcement character of all California 'peace officers' (including parole agents) is underscored by the fact that all have the power to make arrests").[13]

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[13] *See also* John Michael Pelletier, Note, *Searches And Seizures: To Warrant or Not to Warrant in Parole and Probation Officer Searches*, 17 Suffolk U. L. Rev. 687, 706 (1983) ("studies

The law enforcement character of the parole officer's job in Pennsylvania is mandated by law. Parole officers are "declared to be peace officers and are hereby given police power and authority" to arrest for parole violations. 61 Pa. Cons. Stat. §331.27. They may carry firearms, 37 Pa. Code §§69.1 and 69.2, and are considered law enforcement officers. 1971 Pa. Att. Gen. Op. No. 57. "While the Board places heavy emphasis on client control and rehabilitation, it nevertheless shares with police the primary goals of law enforcement, community protection and crime prevention." Pennsylvania Board of Probation and Parole, *Police Procedures In The Handling Of Parolees* 1 (1972). "Parole agents are peace officers first." *Id.*, at 15.

Even if the parole officer's role includes a counseling aspect, there is no doubt that role is "surely compromised", *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973), once there has been a decision to recommend revocation and a return to prison. If the relationship was "at least not entirely adversarial" before, *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987), that is dramatically changed by the decision to arrest the parolee. *See* 37 Pa. Code §71.1(a) (if

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indicate that most parole and probation officers consider law enforcement their first responsibility, despite commentators' emphasis on rehabilitation.") (footnote omitted); Robert E. Wolin, *After Release – The Parolee In Society*, 48 St. John's L. Rev. 1, 18 (1973) ("Their official status is that of a peace officer, and this is how they tend to regard their jobs.") (footnote omitted); M. Harris, *Observations of a 'Friend of the Court' on the Future of Probation and Parole*, Dec. 1987 Federal Probation 12, 21 ("As exemplified by the motto of one probation office I visited – 'Trail 'em, nail 'em, and jail 'em' – the themes of probation today seem to involve more concern about coercion, containing and collecting than about caring.").

parole agent believes action of the Board is necessary he may apply for arrest warrant). *See also Nelson v. Balazic*, 802 F.2d 1077, 1079 (8th Cir. 1986) (when parole agent arrested parolee, his "actions were functionally equivalent to those of a police officer"). "The first stage [of parole revocation] occurs when the parolee is arrested and detained, usually at the direction of his parole officer." *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972). The authorities deciding to arrest the parolee "may be anything but neutral and detached." Neil P. Cohen & James J. Gobert, *The Law of Probation and Parole* §11.04 at 533 (1983). In Pennsylvania, after the arrest, the parole agent then "serves in the role of a prosecutor" at the revocation hearing. Timothy P. Wile, *Pennsylvania Law of Probation and Parole* §5.12 at 89 (1993).[14]

In this case, Scott had been arrested for alleged parole violations by his parole agent and he was in custody when the decision was made to search his house. Pet. App. 2a; J.A. 9a-10a. The "sole purpose for conducting the search was to uncover evidence of additional violations." Pet. App. 37. *See* Brief for Petitioner 32. The parole agents were thus performing a classic law enforcement function, attempting to gather evidence to introduce

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[14] The adversarial posture in these proceedings was demonstrated by Scott's parole agent, Floyd Gallo, cross-examining Scott and his witnesses at the parole revocation hearing, and making closing argument urging revocation. J.A. 94a-106a; 126a-127a; 129a-131a. One witness Gallo called, Eric Hahn, asserted that Gallo had asked him to stretch the truth, and he asserted in an affidavit admitted into evidence (D-1) that Gallo said he never wanted Scott out of prison. *See* Pet. App. 20a-21a; Reproduced Record 103a, 140a; J.A. 43a-45a.

at a parole revocation hearing to secure Scott's incarceration. Parole agents conduct searches and look for evidence of parole violations for use at parole violation proceedings because it is their responsibility to try and remove the parolee from society if necessary.[15] Like police, they are subject to the institutional pressures of effectively performing their peace officer role of protecting the safety of the community. The pressures are particularly intense because the entire population they deal with is sentenced offenders.

> Since the parole officer will probably be primarily interested in the question of whether his parolee's parole will be continued – not whether the parolee will be convicted of a new offense – he will have a strong incentive to obtain evidence by illegal means so long as he knows the evidence will be admissible at the parole revocation hearing.
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> Welsh S. White, *The Fourth Amendment Rights of Parolees and Probationers*, 32 Univ. Pitt. L. Rev. 167, 201 (1969).

The parole agent is a far cry from the court clerk, the magistrate, or the legislator whom this Court has concluded are not in need of deterrence from conducting unconstitutional searches. He is like a police officer when he searches and should be deterred from conducting unconstitutional searches.

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[15] Over two-thirds of all probationers and parolees returned to custody in 1996 were for technical violations not involving the commission of new crimes. Criminal Justice Institute, *The Corrections Yearbook* 154 (1997).

B. The Need For Applying The Exclusionary Rule At Parole Revocation Hearings For Parole Agent Searches Outweighs The Costs.

The Board concedes that "application of the [exclusionary] rule may have some deterrent effect upon parole officers", but urges that the costs are too high to protect the Fourth Amendment rights of parolees and their families in their homes. Brief for Petitioner 29.

There are costs to be sure. There will sometimes be the loss of otherwise reliable evidence, and there will occasionally be parolees whose parole will not be revoked solely because of the operation of the exclusionary rule. The loss of otherwise reliable evidence is the price whenever it is necessary to have the exclusionary rule operate to make Fourth Amendment protections meaningful. However, because the burden of proof at a revocation proceeding is typically only by a preponderance of the evidence,[16] rather than beyond a reasonable doubt, and because many parole conditions subject the parolee to possible revocation for violation,[17] fewer parolees are likely to avoid revocation than those who

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[16] This is the standard of proof in Pennsylvania. Pet. App. 16a n.10. *See generally*, Neil P. Cohen & James J. Gobert, *The Law Of Probation And Parole* §14.08 at 632.

[17] "In most cases both probationers and parolees are given an extensive list of conditions which can affect most aspects of their lives." Neil P. Cohen & James J. Gobert, *supra*, §5.02 at 185. *See also* Robert E. Wolin, *After Release, The Parolee In Society*, 48 St. John's L. Rev. 1, 13 (1973) ("In New York, both parole officers and parolees have expressed the view that a parolee would have to be in a comatose state not to violate his parole rules in some respect.") (footnote omitted).

avoid conviction at trial by operation of the exclusionary rule. Moreover, as we have noted, the reasonable suspicion standard provides broad search powers for the parole agent.

As Professor LaFave has observed, "surely the probation and parole systems are not so weak that it must be assured that only through police illegality can they effectively function." 1 Wayne R. LaFave, *Search and Seizure: A Treatise On The Fourth Amendment* §1.6(g) at 183 (3d Ed. 1996). In those states which have been applying the exclusionary rule to revocation proceedings,[18] there has been no showing that the parole system is not effectively functioning or that fewer paroles are being granted.[19]

The argument that the revocation hearing will be overly burdened applies to any rights of the parolee and has been rejected in other contexts. *See Morrissey v. Brewer*, 408 U.S. 471, 483 (1973). It should be rejected here as well because there are no additional significant burdens. The state will usually require but one witness on

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[18] *See, e.g., State ex rel. Juvenile Dept. of Multnomah County v. Rogers*, 836 P.2d 127 (Or. 1992); *State v. Lampman*, 724 P.2d 1092 (Wash. App. 1986); *State v. Cross*, 487 So. 2d 1056 (Fla.), *cert. dismissed*, 479 U.S. 805 (1986); *Piccarillo v. New York State Board of Parole*, 397 N.E.2d 354 (N.Y. 1979); *Amiss v. State*, 219 S.E.2d 28 (Ga. Ct. App. 1975); *State v. Marquart*, 945 P.2d 1027 (N. Mex. Ct. App. 1997). The cases around the country for and against exclusion are collected in *Marquart*. *Id.*, at 1029-30.

[19] While not addressing this point in particular, the Court made the same general point in *Morrissey v. Brewer*, 408 U.S. 471 (1972). "Serious studies have suggested that fair treatment on parole revocation will not result in fewer grants of parole." *Id.*, 408 U.S. at 483 (footnote omitted).

the suppression issue, the searching agent who often is the parole agent who will testify concerning any alleged parole violations. There is no complex body of law to be learned by the agents conducting the searches or the hearing examiners making the Fourth Amendment ruling, because they need to understand only the common sense standard of reasonable suspicion. *See, e.g., Shadwick v. City of Tampa,* 407 U.S. 345, 351-52 (1972) (clerks have capacity to determine probable cause for arrest for minor offenses). Probation and parole violation hearings are often conducted by judges who are already schooled in the Fourth Amendment. Neil P. Cohen & James J. Gobert, *The Law Of Probation And Parole* §14.07 at 628 (1983).[20]

The need for application of the exclusionary rule to parole agent searches exceeds the costs. The Fourth Amendment rights of not only over three million probationers and parolees, but also their families, will be left without any meaningful protection in their homes if the Fourth Amendment exclusionary rule is not applied to

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[20] In *Gagnon v. Scarpelli,* 411 U.S. 778 (1973), this Court held that counsel was not constitutionally required in all revocation proceedings, while noting that the state had to determine whether counsel was required in that case because of a claim that a confession introduced was involuntary and false. *Id.,* 411 U.S. at 791. Whether counsel would be necessary to aid in pressing a Fourth Amendment claim is not an issue in this case, and is unlikely to arise in the future. Most jurisdictions, like Pennsylvania, now provide for representation by counsel at parole and probation revocation proceedings. Neil P. Cohen & James J. Gobert, *The Law Of Probation And Parole* §91.8 at 451 (1983) and 347-49 (Supp. 1997).

deter unconstitutional searches.[21] The rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effective available way – by removing the incentive to disregard it." *United States v. Calandra,* 414 U.S. 338, 347 (1974) (quoting *Elkins v. United States,* 364 U.S. 206, 217 (1960)).

There are no alternative remedies meaningfully available to deter parole agents from conducting unconstitutional searches. Significantly, the Board does not claim that there are any other remedies that will deter unconstitutional conduct, and none of the amici cite any instances where a parole agent has been sanctioned for violating the Fourth Amendment rights of a parolee. In Pennsylvania, parole agents, as a matter of Pennsylvania law, have absolute tort immunity for their actions in searching and arresting parolees, even when they violate rights intentionally.[22] *See and compare INS v. Lopez-*

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[21] In the past, this Court has considered probationers and parolees in the same manner in assessing their rights. *Gagnon v. Scarpelli,* 411 U.S. 778, 782 (1973). 3.8 million adults are on probation and parole in the United States. U.S. Dept. of Justice, Bureau of Justice Statistics, *Correctional Population in the United States, 1995* iii (1997). "[T]he number of individuals affected may be considered when weighing the costs and benefits . . . of applying the exclusionary rule . . . " *Illinois v. Krull,* 480 U.S. 340, 353 (1987).

[22] *LaFrankie v. Miklich,* 618 A.2d 1145, 1148-49 (Pa. Commw. Ct. 1992). Under 42 U.S.C. §1983, courts have held that because parole officers perform similar law enforcement functions when they arrest and search, they have the same qualified immunity as police officers. *E.g., Mee v. Ortega,* 967 F.2d 423 (10th Cir. 1992). "[T]he qualified immunity defense . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

Mendoza, 468 U.S. 1032, 1044 (1984) (deterrence value of exclusionary rule in deportation proceedings is reduced because "the INS has its own comprehensive scheme for deterring Fourth Amendment violations by its officers.")

The application of the exclusionary rule to police searches and criminal trials has played a vital role in advancing the teaching of police officers in Fourth Amendment limits on their powers and in training them to respect those limits.[23] The rule is necessary in the parole context as well. The parole officer who testified concerning the search of Scott's home "perceived that he had boundless authority to conduct a search of the residence." Pet. App. 30a. Of course, as a practical matter he does if there is no exclusionary rule in parole revocation proceedings. Operation of the exclusionary rule may be even more important here than for police actions because the Fourth Amendment often requires police to obtain judicial authorization before they conduct the search. Since *Griffin v. Wisconsin, supra*, requires reasonable suspicion, and no warrant for the search of a parolee's home, there will be no neutral oversight of parole officer searches of parolees' homes either before or after the fact without application of the exclusionary rule to parole revocation proceedings. *Griffin* will be a dead letter unless the exclusionary remedy is available.

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[23] *See, e.g., United States v. Leon*, 468 U.S. 897, 919 n.20 (1984) (quoting Jerold Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 Mich. L. Rev. 1319, 1412 n.14 (1977); *Elkins v. United States*, 364 U.S. 206, 220-21 (1960); Yale Kamisar, *A Defense of the Exclusionary Rule*, 15 Crim. L. Bull. 5, 10-12 (1979).

The Pennsylvania Supreme Court was right:

> "Under these circumstances, when there is no reasonable suspicion of a parole violation, there is a need to apply the exclusionary rule to the revocation process since otherwise there is nothing to deter a parole agent from conducting an illegal search or engaging in other illegal activity to obtain evidence. The parole agent could establish a parole violation by means of illegally obtained evidence in a proceeding which places a minimal burden of proof upon the Commonwealth, and the same result would be achieved as if the parolee was criminally tried – the parolee would be incarcerated. In this limited instance, the deterrent effect to be gained through application of the exclusionary rule in parole revocation hearings substantially outweighs the potential injury to the functioning of the revocation proceedings.
>
> Pet. App. 15a-16a (footnote omitted).

This Court should affirm the Pennsylvania Supreme Court order in this case, applying the exclusionary rule and suppressing the fruits of an unconstitutional parole agent search at a parole revocation hearing.[24]

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[24] Because this case does not involve a police search there is no need to reach the issue of whether and under what circumstances the exclusionary rule should apply to such searches at revocation proceedings. If the Court nevertheless addresses the question, it should hold that the exclusionary rule applies to police officers as well.

While the deterrent effect is particularly strong when the officer knows that the target of the search is on probation or

CONCLUSION

The judgment of the Pennsylvania Supreme Court should be affirmed.

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parole, police are generally well aware whenever a search is conducted that millions of individuals are on probation and parole and that revocation, with its lower standard of proof, often provides an easier prosecutorial alternative than a criminal trial for incarcerating someone. *See, e.g., United States v. Workman*, 585 F.2d 1205, 1211 (4th Cir. 1978) (holding exclusionary rule applies to revocation proceedings); *United States v. Bazzano*, 712 F.2d 826, 847-48 (3d Cir. 1982) (en banc) (dissenting opinion), *cert. denied, sub nom. Mollica v. United States*, 465 U.S. 1078 (1984). "There is considerable force to the argument now accepted by some courts, that revocation of conditional release is a sufficiently common consequence of a policeman's activities that a broader use of the exclusionary rule is warranted." 1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* §1.6(g) at 81-82 (3d Ed. 1996). *See also* Honorable Brian L. Crowe, *The Exclusionary Rule in Probation Revocation Proceedings*, 13 Loy. U. Chi. L.J. 373, 390-93 (1982).

Further, given the substantial need to apply the exclusionary rule to parole agents at revocation proceedings, and the cooperation which frequently occurs between parole officers and police, one rule is beneficial to take away any "inducement to subterfuge and evasion." *Elkins v. United States*, 364 U.S. 206, 222 (1960) (holding that evidence unconstitutionally seized by state officers is subject to exclusionary rule in federal criminal trials to the same extent as searches by federal agents).

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In The Supreme Court Of The United States

OCTOBER TERM, 1997

PENNSYLVANIA BOARD OF
PROBATION AND PAROLE,
Petitioner

vs.

KEITH M. SCOTT,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

REPLY BRIEF FOR PETITIONER

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ARGUMENT

In our opening brief, we argued that parolees' diminished expectation of privacy, combined with the important governmental need to conduct searches of their residences, provides the justification for constitutional approval of searches by parole agents without individualized suspicion of wrongdoing. In addition, we argued that to ensure compliance with conditions placed upon parolees, the government requires broad discretion to define the conditions under which parolees may be searched. Finally, we argued that, even if a consent to search provision like the one imposed here somehow fails to meet a reasonableness standard under the Fourth Amendment, the exclusionary rule should not be extended to parole revocation proceedings so as to preclude consideration by parole authorities of relevant evidence obtained in a search.

Respondent has presented several arguments, most of which have been addressed in our principal brief and the Brief for the United States. A few of respondent's contentions, however, warrant a reply.

I. THE DECISION BELOW DOES NOT REST ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

In its order granting the petition for writ of certiorari, the Court invited the parties to address the question whether a search of a parolee's residence must be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of parole. Petitioner and *amici*, including the United States, have addressed the question

in their briefs. Scott, however, takes the position that the Court should not address the question on which it requested briefing because, in his view, the decision below rests on an adequate and independent state ground. (Br. at 9-11). Respondent misperceives both the state supreme court's decision and this Court's precedent.

The Court has held that, while it must "ascertain for itself . . . whether the asserted non-federal ground independently and adequately supports the judgment," *Michigan v. Long*, 463 U.S. 1032, 1038 (1983), it possesses jurisdiction to review a state supreme court decision in the absence of a "plain statement" that the decision below rests on an adequate and independent state ground. *Id.* at 1044. Thus, when a state court decision

> fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [the Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed federal law required it to do so.

Id. at 1040-41. *Accord Ohio v. Robinette*, 519 U.S. ___, ___, 117 S.Ct. 417, 420 (1996).

Scott argues that, because the decision below relied upon an earlier state supreme court decision, *Commonwealth v. Williams*, 547 Pa. 577, 692 A.2d 1031 (1997), and because *Williams* in turn examined both state and federal law in outlining the rights of parolees when their residences are searched, the decision in this case rests upon an adequate and independent state ground. Scott is simply mistaken.

It is certainly true, as Scott says, that in *Williams* the Pennsylvania Supreme Court considered the meaning of Pennsylvania's consent-to-search form and held that:

> the parolee's [consent to searches as a condition of parole] acts as acknowledgment that the parole officer has a right to conduct *reasonable searches* of his residence listed on the parole agreement without a warrant.

Id., at 588, 692 A.2d at 1036 (emphasis added). What constitutes a "reasonable search," under this acknowledgment, however, was treated by the *Williams* court as a question of constitutional law. The court thus evaluated the reasonableness of the search in *Williams* under the Fourth Amendment, *id.* at 585-90, 692 A.2d at 1035-38, and, *because the defendant in that case had raised the issue*, under the corresponding provision of the Pennsylvania Constitution as well. *Id.* at 590-94, 692 A.2d at 1038-39.

In this case, however, Scott raised, and the Pennsylvania Supreme Court decided, only a federal issue. The decision of the state supreme court in this case clearly relies upon federal law. Pet. App. 8a; *id.* at n. 6; *id.* at 9a. Indeed, the opinion expressly relies upon decisions of this Court under the Fourth Amendment. *Id.* Furthermore, the specific reference below to the *Williams* decision states as follows:

> In deciding what effect the signing of the consent provision had on Williams's limited rights *under the Fourth Amendment*, we "balanced the governmental interests involved in granting parole and supervising parolees with that interest

> of the private individual, i.e., the parolee, which has been affected by the governmental action."

Pet. App. 9a (emphasis added), *citing Williams*, 692 A.2d at 1035 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). It is thus clear on the face of the opinion that the state supreme court's review of the effect of the consent provision in this case was based on federal law.

The grounds for the decision below with respect to the effect of a consent to search condition on the validity of a subsequent search were decided under the Fourth Amendment. The decision does not rest on an adequate and independent state ground and, therefore, the Court possesses jurisdiction to decide the consent issue.[1] *Ohio v. Robinette*, 519 U.S. at ____, 117

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[1]We also note Scott's argument (Br. at 12 n.3) that, because the General Assembly of Pennsylvania enacted a statute in 1995 which authorizes warrantless searches of property where there is "reasonable suspicion to believe that the real or other property in the possession of or under control of the offender contains contraband or other evidence of violations of the conditions of supervision," Pa. Stat. Ann. tit. 61, §331.27a(b)(2) (Purdon Supp. 1997), this case is, in his words, a "poor vehicle" to answer the question of the effect of a consent provision. There are several things wrong with this position. In the first place, it is far from clear that "reasonable suspicion" within the meaning of the state statute equates with the state supreme court's understanding of "reasonable suspicion" under the Constitution. Pet. App. 10a. The court appears to require more particularized suspicion than that the property contains "contraband or other evidence of violations." Moreover, even if the statute *could* be interpreted as a legislative codification of the

(continued...)

S.Ct. at 420 (reliance on federal cases for holding confers jurisdiction).

II. THE VALIDITY OF THE CONSENT PROVISION SHOULD BE TESTED BY ITS RELATIONSHIP TO LEGITIMATE PAROLE OBJECTIVES.

In response to our argument that the States' management of their parole systems presents special needs that support departure from the usual Fourth Amendment requirements of individualized suspicion and probable cause for a search, Scott takes the position that 1) a parole consent provision cannot be constitutional because it is not "voluntary" consent, and 2) it somehow is unfair to treat parolees differently than unconvicted free citizens with respect to searches of their homes and persons. These contentions require but a brief rebuttal.

1. Whether Scott's agreement to the consent to search

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[1](...continued)
Commonwealth Court decision in this case, it does not mean that the codification becomes the constitutional floor any more than a state regulation or practice by itself defines the level of conduct actionable under 42 U.S.C. §1983. *See Davis v. Scherer*, 468 U.S. 183, 194-95 (1984) (officials sued for constitutional violations do not lose immunity merely because their conduct violates statutory or administrative provision). Finally, as we have argued, since the constitutional minimum is less than reasonable suspicion, especially where there is consent, the legislative judgment of the Pennsylvania General Assembly may be different now than it was in 1995.

provision was equivalent to an unincarcerated person's voluntary consent to search is of no moment. Scott appears not to take issue with the general proposition that the government may subject parolees to very specific conditions that "restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen." *Morrissey v. Brewer*, 408 U.S. 471, 478 (1972). Instead, relying primarily upon the decision in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), Scott argues that because his agreement to these parole conditions takes place under circumstances that are what he calls "inherently coercive," the consent to search condition is not "voluntary" and therefore is unconstitutional. Scott misperceives the nature of the relevant inquiry.

a. If "voluntariness," as defined by Scott, were the litmus test, then no parole condition — regardless of its purpose or effect — could survive constitutional attack. The Court, however, has made it clear that parolees may be subjected to conditions governing their activities that could not be imposed upon the general public but which, because of the special need of the government to monitor parolees' behavior, are appropriate and thus constitutional. These restrictions include such conditions as a prohibition against changing residences without permission, a prohibition against consumption of alcohol, and a direction to refrain from associating with certain individuals or engaging in certain activities. *Morrissey v. Brewer*, 408 U.S. at 479. The States' decision to condition parole on a parolee's acceptance of these kinds of parole conditions is no less "inherently coercive" than requiring an agreement to permit searches of the parolee's home and effects while on conditional release from prison. The choice between remaining in prison on the one hand and parole with certain conditions on the other hand may be a choice between two unattractive alternatives; however, the choice remains with the parolee and it remains a voluntary

one.

Surely Scott would not take issue with the government's ability to require him, for example, to refrain from associating with convicted felons while on parole; Scott's decision to accept such a parole condition regulating his freedom of association is no less "voluntary" than his decision to accept a parole condition permitting searches of his residence without individualized suspicion. The validity of the parole condition should be tested by its relationship to legitimate state objectives, not by a fictionalized construct of "inherent coercion."

b. Even the Court's decision in *Schneckloth v. Bustamonte* — relied upon so heavily by Scott — is not to the contrary. *Schneckloth* involved the question of consent to search a motor vehicle stopped by state police officers on a highway. 412 U.S. at 220. Recognizing that there is "no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations" where the question arises, *id.* at 224, and that "voluntariness has reflected an accommodation of the complex of values" implicated in the questioning of a suspect, *id.*, the Court determined that "the question whether a consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of circumstances." *Id.* at 227. The Court stated:

> As with police questioning, two competing concerns must be accommodated in determining the meaning of a "voluntary" consent — the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.

Ibid. Accord Ohio v. Robinette, 519 U.S. ____, 117 S.Ct. at 421

(touchstone of Fourth Amendment is reasonableness which is measured in objective terms by examining totality of circumstances).

Scott apparently does not dispute the legitimate need for searches of parolees' residences; indeed, he informs the Court that his argument " is not to denigrate the legitimate concern for the risk of recidivism on the part of parolees." (Br. at 27). Instead, he equates the presentation of legitimate parole conditions to an inmate under consideration for parole with "governmental coercion" (Br. at 18), and an unconstitutional "waiver" of rights. (Id. at 20). There is absolutely no basis in the record of this case that would provide factual support for coercion, and Scott cites to nothing. Moreover, the Court in *Schneckloth* plainly rejected the waiver argument even for unrestricted citizens. 412 U.S. at 235-42.

> There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a "knowing" and "intelligent" waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.

412 U.S. at 242.[2]

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[2]Scott's suggestion (Br. at 19) that somehow the absence of counsel and "open" proceedings (when an inmate decides whether to accept parole conditions) are evidence of unconstitutionality also was rejected by the Court in *Schneckloth*.
(continued...)

Scott clearly attempts to extract from *Schneckloth* more than what is there, even assuming its quite different factual basis may be compared to that of an inmate seeking parole.

2. Irrespective of the level of "voluntariness" on the part of an inmate deciding whether to accept parole conditions, the government must have the ability to impose parole conditions that are legitimately related to the purposes of parole supervision. As we argued in our principal brief, the value of an unannounced search for firearms which may be in the possession or control of a parolee already convicted of murder hardly can be questioned. Indeed, Scott's brief makes no attempt to attack the importance of this interest. What Scott suggests, however, is that the government should be required to treat parolees the same as unconvicted citizens, at least insofar as searches of their residences are concerned. (Br. at 26-27).

The short answer to Scott's suggestion, as we have argued, is that parolees are not the same as unconvicted citizens and the Court recognizes they need not be treated the same. *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987); *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). However unpalatable this concept may be to Scott and his *amicus*, the Court has not retreated from the basic and unquestioned premise of parole: it is "conditional liberty properly dependent on observance of special . . . restrictions." *Griffin*, 483 U.S. at 874, *quoting Morrissey*, 408 U.S. at 480. The parade of horribles involving unconvicted citizens, advanced by Scott and his *amicus*, simply has no bearing upon the question of the importance of the relative interests in this case. Were it otherwise, surely the Court would not have gone to the lengths it did in decisions such as

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[2](...continued)
412 U.S. at 244-45.

Griffin and *Morrissey* to remind of the limited rights of parolees. *Griffin*, 483 U.S. at 874-75.

Acceptance of Scott's position would make the Fourth Amendment rights of parolees nearly the equivalent of those of free citizens. The Court should decline Scott's invitation.

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the Supreme Court of Pennsylvania should be reversed.

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v.

KEITH M. SCOTT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether the exclusionary rule applies to parole revocation proceedings.

2. Whether a search of a parolee's residence must be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Although parole has largely been abolished within the federal system,[1] the United States has a substantial interest in both of the questions presented by this case. The sound administration of the federal penal system will be impaired if probative evidence that a federal supervisee has violated the terms of his probation or supervised release is excluded from revocation proceedings. See 18 U.S.C. 3563

[1] The Sentencing Reform Act of 1984 (SRA), which became effective November 1, 1987, abolished parole for federal offenses committed after the effective date of the Act. See Pub. L. No. 98-473, Tit. II, Ch. II, §§ 218(a)(5), 235(a)(1), 98 Stat. 2027, 2031. Parole had been governed by the Parole Commission and Reorganization Act, see 18 U.S.C. 4201-4218 (1982). Those provisions have been continued in effect for prisoners who committed crimes before the effective date of the SRA. See SRA § 235(b)(1)(A), 98 Stat. 2032; Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 316, 104 Stat. 5115; parole Commission Phaseout Act of 1996, Pub. L. No. 104-232, § 2, 110 Stat. 3055.

(prescribing conditions of probation), 3565 (authorizing revocation for violation of conditions), 3583 (prescribing conditions of supervised release and authorizing revocation for violation of conditions). And while the federal government has not conditioned probation or supervised release on consent to home searches, the Court's resolution of the consent issue in this case could affect the United States' ability to use evidence seized in state searches of state supervisees. See, *e.g.*, *United States* v. *Ooley*, 116 F.3d 370 (9th Cir. 1997), petition for cert. pending, No. 97- (Jan. 8, 1998). The United States previously participated as amicus curiae in *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987), which presented a question concerning the reasonableness of the warrantless search of a probationer's home.

STATEMENT

1. On April 2, 1982, respondent Keith M. Scott was sentenced to ten to twenty years' imprisonment for third degree murder pursuant to his plea of nolo contendere. Pet. App. 1a, 19a. On September 1, 1993, he was released on parole subject to enumerated conditions. *Ibid.* One of the conditions of his parole was that he refrain from "owning or possessing any firearms or other weapons." *Id.* at 1a-2a. At the time of his release, respondent signed Pennsylvania Board of Probation and Parole Form PBPP-11, entitled "Conditions of Parole/Reparole," which stated, *inter alia*:

> In consideration of being granted the privilege of parole/reparole by the Pennsylvania Board of Probation and Parole, I hereby agree that:
>
> * * * * *
>
> I expressly consent to the search of my person, property and residence, without a warrant by agents of the

> Pennsylvania Board of Probation and Parole. Any items, in [sic] the possession of which constitutes a violation of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.

J.A. 6a-7a; see Pet. App. 30a n.3.[2]

Approximately five months later, respondent was arrested by three parole officers for parole violations that included his possession of two guns during the first month of his release. Pet. App. 2a, 19a-20a. After taking respondent's house keys from him, parole officers transported him to jail. *Id.* at 2a. Parole officers subsequently searched the house that respondent shared with his mother and stepfather. *Id.* at 2a-3a, 23a-24a. Respondent's mother was present in the house during the search. *Id.* at 3a, 24a. The officers found five unloaded firearms under a sofa in a sitting room adjacent to respondent's bedroom. *Ibid.* Respondent's mother told the officers that the guns belonged to her husband and that respondent was unaware of their presence. *Id.* at 3a, 25a. From a closet in the same room, the officers retrieved a compound bow and three arrows. *Id.* at 3a, 24a.

2. The Board conducted a parole revocation hearing at which respondent moved to suppress the weapons as the

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[2] The consent term is contained in a parole form that "is a standard form used statewide and parole is conditioned upon signing the form." *Commonwealth* v. *Walter*, 655 A.2d 554, 556 n.1 (Super. Ct.), appeal denied, 670 A.2d 141 (Pa. 1995). Pennsylvania statutes provide a regulatory scheme governing parole searches based on reasonable suspicion, but those provisions do not address consent searches. See 61 Pa. Cons. Stat. Ann. §§ 331.27a, 331.27b (Supp. 1997). Nor are consent searches addressed in the Pennsylvania statute governing the general conditions of parole. 37 Pa. Code § 63.4.

fruit of an unconstitutional search. Pet. App. 3a-4a, 25a. One of the officers who had conducted the search testified that he was authorized to search a parolee's approved residence with or without the homeowner's permission, and that he had searched respondent's residence because a fellow parole officer had told him that there might be guns there. *Id.* at 4a-5a, 25a. The hearing examiner admitted the evidence concerning the weapons found at respondent's residence, stating that the search was "within requirements so established for consent by residences of parolees by parole agents and the Commonwealth." *Id.* at 25a.

Respondent testified at the parole revocation hearing that he did not know the guns were in the house because, before his release, he had instructed his mother and stepfather to get rid of them and his mother told him that they had been removed. Pet. App. 5a, 21a. Respondent's stepfather testified that the guns belonged to him, that he knew guns were not permitted in respondent's approved residence, and that he (the stepfather) had therefore removed them from the gun closet and placed them under the sofa in anticipation of giving them to his brother. *Id.* at 5a, 22a. The Board found that respondent had committed all of the violations alleged against him and ordered him to serve the remainder of his sentence and 36 months' backtime. *Ibid.* Three months later, the Board modified its findings to add that respondent was considered a threat. *Ibid.* Respondent unsuccessfully sought administrative relief from the Board. *Ibid.*

3. Respondent then appealed to the Commonwealth Court of Pennsylvania, which reversed and remanded for a new revocation hearing. Pet. App. 19a-39a.[3] The court

[3] The Commonwealth Court's jurisdiction to consider respondent's appeal rested on the judicial review provisions of Pennsylvania's Administrative Agency Law, 2 Pa. Cons. Stat. Ann. §§ 701 *et seq.*

concluded that the search had been conducted without the consent of respondent's mother, *id.* at 29a-30a, and that the consent-to-search provision of respondent's parole release form "does not comport with the dictates of" applicable precedent, *id.* at 30a n.3. The court also held that "no enacted statute or regulation" gave the parole officers authority to search under the circumstances presented here. *Id.* at 31a. The court further held that the evidence acquired during the search should have been suppressed at the parole revocation hearing. *Id.* at 31a-37a. It explained that, under the circumstances of this case, the exclusionary rule's deterrent effect on unlawful official conduct "substantially outweighs the injury which would result from excluding the evidence obtained from [the parole officer's] illegal search." *Id.* at 36a.

4. The Parole Board obtained leave to appeal to the Supreme Court of Pennsylvania, which affirmed the judgment of the Commonwealth Court. Pet. App. 1a-18a. The court first held that the consent-to-search provision of respondent's parole release form did not provide a valid basis for the search. Relying on its prior decision in *Commonwealth* v. *Williams*, 692 A.2d 1031 (Pa. 1997), the court stated that

> the parolee's signing of a parole agreement giving his parole officer permission to conduct a warrantless search does not mean either that the parole officer can conduct a search at any time and for any reason or that the parolee relinquishes his Fourth Amendment right to be free from unreasonable searches. Rather, the parolee's signature acts as acknowledgment that the parole officer has a right to conduct reasonable

(1995). See *Bronson* v. *Commonwealth Bd. of Probation & Parole*, 421 A.2d 1021, 1025 (Pa. 1980), cert. denied, 450 U.S. 1050 (1981).

searches of his residence listed on the parole agreement without a warrant.

Pet. App. 9a-10a (quoting *Williams*, 692 A.2d at 1036). Under *Williams*, the court explained, a "search will be deemed reasonable if the totality of the evidence demonstrates: (1) that the parole officer had a reasonable suspicion that the parolee had committed a parole violation, and (2) that the search was reasonably related to the parole officer's duty." *Id.* at 10a (quoting *Williams*, 692 A.2d at 1036).[4]

Based on its decision in *Williams*, the Pennsylvania Supreme Court held that respondent "has a Fourth Amendment right against unreasonable searches and seizures that is unaffected by his signing of the consent to search provision." Pet. App. 10a. The court further held that respondent's rights under the Fourth Amendment were "clearly violated since the search was conducted without reasonable suspicion." *Ibid.* The court explained that "the agents' suspicion was based on mere speculation

[4] The court in *Williams* observed that "[o]ther state courts faced with the issue of whether a parolee's Fourth Amendment rights have been violated by a warrantless search by his parole officer where the parolee has signed a consent form upon release have attempted to balance the governmental and individual interests by adopting a 'middle ground' approach," under which parole officers need not obtain a warrant but are required to have reasonable suspicion that the parolee has violated the conditions of his release. 692 A.2d at 1036. The court concluded that "this 'middle ground' approach to warrantless searches pursuant to a signed parole agreement comports with the Fourth Amendment protection afforded to parolees by the United States Supreme Court in [*Griffin* v. *Wisconsin*, 483 U.S. 868 (1987)] and in our sister states." *Id.* at 1037. In the *Williams* court's view, that approach accommodates the State's interest in the effective operation of its parole system, while "protect[ing] the parolee by providing a check against state encroachment upon the parolee's limited Fourth Amendment right to be free from unreasonable searches." *Ibid.*

and was insufficient to support a warrantless search of the room adjacent to [respondent's] bedroom." *Ibid.*

The court next considered whether the evidence acquired during the search should have been suppressed at respondent's parole revocation hearing. The court acknowledged "the general rule that the exclusionary rule is inapplicable in parole revocation hearings." Pet. App. 13a. When the officer conducting the search is unaware of the parolee's status, the court stated, "[t]here is no reason to apply the rule in a parole revocation hearing because it is unlikely to act as an additional deterrent to illegal police behavior." *Id.* at 15a. The court determined, however, that "[a] different balance exists * * * when the officer knows or has reason to know that the suspect is a parolee or probationer." *Ibid.* "In this limited instance," the court concluded, "the deterrent effect to be gained through application of the exclusionary rule in parole revocation hearings substantially outweighs the potential injury to the functioning of the revocation proceedings." *Id.* at 16a. Because the parole officers who conducted the search were aware of respondent's status as a parolee, the court held that "the evidence obtained from the illegal search of his residence should be suppressed." *Id.* at 17a.

5. This Court granted the Parole Board's petition for a writ of certiorari limited to the question whether the exclusionary rule applies to parole revocation proceedings, and invited the parties to brief and argue the following question: "Must a search of a parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole?" 118 S. Ct. 554.

SUMMARY OF ARGUMENT

I. The exclusionary rule should not apply to parole revocation proceedings. The exclusionary rule, as fashioned by this Court, is designed to safeguard the Fourth Amendment rights of the general community by deterring constitutional violations. Because the exclusionary rule impedes the truth-finding process by preventing consideration of probative evidence, this Court has consistently rejected proposed extensions of the rule outside the context of the criminal trial itself.

Extension of the exclusionary rule to parole revocation hearings is unlikely to have a significant impact on the incidence of Fourth Amendment violations. Police officers, whose principal responsibility is the investigation of crimes and the apprehension of criminals, are unlikely to alter their behavior based on the potential admissibility of seized evidence at a parole revocation proceeding, even if they are aware that the object of their search is a parolee. A parole officer is concededly more likely to focus on the potential impact of any misconduct on a parolee's suitability for continued release. Parole officers, however, are unlikely to be subject to the institutional pressures that are thought to require an extraordinary deterrent to unconstitutional behavior.

Extension of the exclusionary rule to parole revocation proceedings would also entail substantial costs, over and above the interference with the truth-finding process that is an inherent consequence of the suppression of probative evidence. The requirement that parole authorities adjudicate suppression motions would significantly complicate revocation proceedings, thereby subverting the State's substantial interest in expeditious and relatively informal resolution of revocation issues. Because a prisoner released on parole before the expiration of his term may have

a greater propensity to engage in conduct that endangers the public than a person who has never been convicted of a crime, the State has an especially strong interest in ensuring that decisions regarding the parolee's suitability for continued release are based on complete and accurate information. Respondent should not be permitted to retain the benefits of parolee status, based on the asserted illegality of the search at issue here, when his failure to comply with the conditions of release indicates that he may pose a threat to the public welfare.

II. Where a parolee has consented to searches as a condition of parole, the Fourth Amendment does not require individualized suspicion of wrongdoing as a predicate for a search of his residence. This Court has repeatedly recognized that consent is a valid basis for search, even in the absence of probable cause and a warrant. The Court has recognized, more generally, that constitutional rights are typically subject to waiver, and that the government has broad latitude to enter into arrangements whereby an individual agrees to surrender such rights in return for some form of favorable treatment.

Just as a criminal defendant may enter into a plea agreement providing for a period of incarceration, nothing in the Constitution prevents a potential parolee from agreeing that, in return for the less onerous punishment of release (under supervision) into the community, the State may carry out a search at any time. Such an arrangement protects the State's interest in reducing the threat to the public safety and welfare that early release may entail. Permitting the enforcement of such agreements is also likely to further the interests of potential parolees: at least in a borderline case, enhancing the State's ability to monitor its parolees may increase a parole board's willingness to release a prisoner into the community. As in the plea bargaining context, moreover,

the prisoner's consent to the search condition is not rendered involuntary by the fact that the alternative—continued incarceration—is an unattractive one.

ARGUMENT

I. THE EXCLUSIONARY RULE SHOULD NOT APPLY TO PAROLE REVOCATION PROCEEDINGS

A. Extension Of The Exclusionary Rule Depends Upon Balancing The Rule's Likely Deterrent Value Against Its Social Costs

The Fourth Amendment prohibits government officials from engaging in "unreasonable searches and seizures" but "contains no provision expressly precluding the use of evidence obtained in violation of its commands." *United States* v. *Leon*, 468 U.S. 897, 906 (1984). In *Weeks* v. *United States*, 232 U.S. 383 (1914), however, this Court held that evidence seized in violation of the Fourth Amendment is generally inadmissible at a federal criminal trial, and in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), the Court applied the exclusionary rule to the States. "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim," but "to deter future unlawful police conduct." *United States* v. *Calandra*, 414 U.S. 338, 347 (1974). Accord, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465, 486 (1976) ("The primary justification for the exclusionary rule * * * is the deterrence of police conduct that violates Fourth Amendment rights."); *Linkletter* v. *Walker*, 381 U.S. 618, 636-637 (1965). "In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Calandra*, 414 U.S. at 348; see *Leon*, 468 U.S. at 906.

This Court has consistently recognized the "substantial social costs exacted by the exclusionary rule." *Leon*, 468 U.S. at 907. The fact that physical evidence has been obtained in violation of the Fourth Amendment generally has no bearing on the probative value of the evidence seized. To the contrary, "the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." *Stone*, 428 U.S. at 490; accord, *e.g.*, *United States* v. *Janis*, 428 U.S. 433, 447 (1976) (observing that application of the exclusionary rule will "nearly always" cause "concededly relevant and reliable evidence [to] be rendered unavailable"). "An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains." *Leon*, 468 U.S. at 907; accord, *e.g.*, *Stone*, 428 U.S. at 490 ("Application of the rule thus deflects the truthfinding process and often frees the guilty."). That, in turn, may diminish public confidence in the integrity of the criminal justice system. See *id.* at 491 (observing that, "although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice").

Recognizing the potential deleterious effects of the exclusionary rule, this Court has restricted its application to "those areas where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348; accord, *e.g.*, *Arizona* v. *Evans*, 514 U.S. 1, 13-14 (1995); *Illinois* v. *Krull*, 480 U.S. 340, 347 (1987); *Leon*, 468 U.S. at 908; *Janis*, 428 U.S. at 447. The Court has consistently rejected "[p]roposed extensions of the exclusionary rule to

proceedings other than the criminal trial itself." *Leon*, 468 U.S. at 909. The Court has determined, for example, that the rule should not apply on federal habeas corpus, where a state prisoner has already been afforded a full and fair opportunity in the state system to litigate his Fourth Amendment claim, see *Stone*, 428 U.S. at 494; in grand jury proceedings, see *Calandra*, 414 U.S. at 347-352; in civil deportation proceedings, see *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984); or in federal civil tax proceedings where evidence was illegally seized by state officials, see *Janis*, 428 U.S. at 459-460.

Even in criminal prosecutions, the Court has rejected an absolute rule that evidence obtained in violation of the Fourth Amendment may never be introduced at trial. Thus, the Court has held the exclusionary rule to be inapplicable where police officers have acted in objectively reasonable reliance on a search warrant ultimately found to be invalid, see *Leon*, 468 U.S. at 920-922, or on the constitutionality of a statute later declared unconstitutional, see *Krull*, 480 U.S. at 349-350. A criminal defendant who was not himself the victim of an unlawful search may not use the exclusionary rule to obtain suppression of evidence seized in violation of another person's Fourth Amendment rights. See *Alderman* v. *United States*, 394 U.S. 165, 174-175 (1969). And even where illegally seized evidence is excluded from the government's case in chief, the evidence may still be used to impeach a defendant's direct testimony, see *Walder* v. *United States*, 347 U.S. 62, 65 (1954); cf. *Oregon* v. *Hass*, 420 U.S. 714, 721-723 (1975) (statements obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), may be introduced to impeach defendant's testimony); *Harris* v. *New York*, 401 U.S. 222, 224-225 (1971) (same), or to impeach his statements in response to proper cross-examination reasonably suggested by his

direct examination, see *United States* v. *Havens*, 446 U.S. 620, 627-628 (1980).

In limiting the scope of the exclusionary rule, the Court has repeatedly expressed skepticism that extending it beyond the context of a criminal trial will contribute significantly to the rule's deterrent effect. See, *e.g.*, *Calandra*, 414 U.S. at 351 ("Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal."); *Janis*, 428 U.S. at 453-454 (if application of the exclusionary rule to state criminal prosecutions significantly deters misconduct by state officers, "the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a different proceeding surely does not outweigh the cost to society of extending the rule to that situation"); *Stone*, 428 U.S. at 493 (while the exclusionary rule's deterrent value justifies its application at trial, "the additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs").

The Court has indicated, in particular, that the need for deterrence is likely to be substantial only where the officials to be deterred are law enforcement personnel "engaged in the often competitive enterprise of ferreting out crime." *Leon*, 468 U.S. at 914. Thus, the Court has observed that "[j]udges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them." *Id.* at 917. The Court reached a similar conclusion in holding that the exclusionary rule should not apply to evidence seized in reasonable reliance on a state statute because exclusion of

such evidence is unlikely to have a significant deterrent effect on state legislators' enactment of unconstitutional legislation. *Krull*, 480 U.S. at 350-352.

The Court has also been unwilling to extend the exclusionary rule to contexts in which its application would have deleterious consequences over and above the impairment of the truth-finding function that is always inherent in the exclusion of probative evidence. The Court has declined, for example, to apply the rule to procedural settings that cannot readily accommodate suppression hearings. See *Calandra*, 414 U.S. at 349 (application of exclusionary rule "would delay and disrupt grand jury proceedings" because "[s]uppression hearings would halt the orderly process of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective"); *Lopez-Mendoza*, 468 U.S. at 1048 (noting that "[t]he [Immigration and Naturalization Service] currently operates a deliberately simple deportation hearing system, streamlined to permit the quick resolution of very large numbers of deportation actions," and that "[t]he prospect of even occasional invocation of the exclusionary rule might significantly change and complicate the character of these proceedings"). The Court has expressed particular reluctance to apply the exclusionary rule to "proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal." *Id.* at 1046; see *id.* at 1046-1047.

B. The Exclusionary Rule Should Not Be Extended To Parole Revocation Proceedings

1. *The incremental deterrence of Fourth Amendment violations is limited*

The Supreme Court of Pennsylvania recognized that application of the exclusionary rule to parole revocation

proceedings would be unlikely to affect the conduct of officers who are unaware of a parolee's status. See Pet. App. 15a. That holding is clearly correct. In that situation, the remote possibility that the object of a search is in fact a parolee, and that any evidence seized in violation of the Fourth Amendment will be excluded from a parole revocation proceeding as well as from a criminal trial, "is unlikely to act as an additional deterrent to illegal police behavior." *Ibid.*

The court asserted, however, that "[a] different balance exists * * * when the officer knows or has reason to know that the suspect is a parolee or probationer." Pet. App. 15a. Under those circumstances, the court concluded, "there is a need to apply the exclusionary rule to the revocation process since otherwise there is nothing to deter a parole agent from conducting an illegal search or engaging in other illegal activity to obtain evidence." *Ibid.* That reasoning is unsound. Even where the official conducting the search is aware of the parolee's status, application of the exclusionary rule to parole revocation proceedings is unlikely to provide much incremental deterrence of Fourth Amendment violations.

a. Where the search is conducted by police officers whose primary responsibility is the investigation of crimes and the apprehension of criminals, the underlying premise of the exclusionary rule is that the prospect of suppression at the criminal trial itself will provide a substantial disincentive to unlawful searches and seizures. If that premise is accurate, the possibility that the same evidence might be introduced at a parole revocation hearing—a prospect far removed from the principal focus of a police officer's day-to-day activities—is unlikely to alter the rule's deterrent effect in any substantial way. Cf. *Stone*, 428 U.S. at 493; *Janis*, 428 U.S. at 453-454. Thus, even if the police officer is aware that the object of

his search is a parolee, his behavior is unlikely to be affected by the potential admissibility of seized evidence at a parole revocation hearing.

b. Where (as in the instant case) the search is conducted by a parole officer, somewhat different considerations obtain. The parole officer's responsibility is not to enforce the criminal law as against the public generally; it is "to assist parolees and to offer them guidance," *Morrissey* v. *Brewer*, 408 U.S. 471, 478 (1972), as well to monitor their compliance with the conditions of release. When a parole officer investigates a supervisee's possible misconduct, he is therefore likely to be principally concerned with the impact (if any) of that misconduct on the individual's suitability for continued release on parole, rather than with the possibility of a new criminal prosecution.

Nevertheless, parole officers are unlikely (at least as a general matter) to be subject to the institutional pressures that have been invoked in support of the exclusionary rule. While parole officers are not "judicial officers," neither are they "adjuncts to the law enforcement team." *Leon*, 468 U.S. at 917; cf. *Griffin* v. *Wisconsin*, 483 U.S. 868, 876 (1987) ("Although a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen."). As this Court has observed, it would "be unfair to assume that the parole officer bears hostility against the parolee that destroys his neutrality; realistically the failure of the parolee is in a sense a failure for his supervising officer." *Morrissey*, 408 U.S. at 485-486. See also *Gagnon* v. *Scarpelli*, 411 U.S. 778, 783-784 (1973); *id.* at 784 ("the probation or parole officer's function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation").

Individual parole officers (like judges or legislators) will occasionally reach erroneous judgments as to the precise contours of applicable Fourth Amendment requirements. Unlike "a law enforcement officer engaged in the often competitive enterprise of ferreting out crime," *Leon*, 468 U.S. at 914 (internal quotation marks omitted), however, parole officers as a class should be largely free from the institutional pressures that are thought to require an extraordinary deterrent to unconstitutional behavior. As with magistrates, see *Leon*, *supra*, and state legislators, see *Krull*, *supra*, application of the exclusionary rule to such officials can therefore be expected to have an insubstantial effect on the incidence of Fourth Amendment violations.

2. *The costs of extending the exclusionary rule to parole revocation proceedings are high*

Against whatever modest incremental deterrence might flow from extension of the exclusionary rule to parole revocation proceedings must be weighed the costs of such a regime. Application of the exclusionary rule in the parole revocation context would have substantial costs, over and above the impairment of the truth-finding function that is an inherent consequence of the suppression of probative evidence.

a. Application of the exclusionary rule to parole revocation proceedings would significantly disrupt the conduct of the hearings themselves. This Court in *Morrissey*, while establishing minimum procedural requirements for the conduct of parole revocation hearings, "emphasize[d] [that] there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense." 408 U.S. at 489.[5] The Court stated in particular that the

[5] See also *Morrissey*, 408 U.S. at 480 ("[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights

proceeding should be held before "a 'neutral and detached' hearing body such as a traditional parole board, *members of which need not be judicial officers or lawyers.*" *Ibid.* (emphasis added).

In *Gagnon*, the Court observed that "[t]he introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding," 411 U.S. at 787; see also *id.* at 787-788, and concluded that "the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings," *id.* at 790. The Court warned in particular that "[t]he role of the hearing body itself, aptly described in *Morrissey* as being 'predictive and discretionary' as well as factfinding, may become more akin to that of a judge at a trial" in cases where attorneys are utilized. *Id.* at 787. The Court stated that appointment of counsel will generally be appropriate only where the parolee presents (*id.* at 790)

> a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

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due a defendant in such a proceeding does not apply to parole revocations."); *id.* at 483 ("Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole."); *id.* at 484 ("What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior.").

Thus, the thrust of the *Gagnon* Court's analysis is that the participation of counsel—and the consequent formalization of the hearing process—would be desirable only in those comparatively rare cases where parole authorities would otherwise be unable to reach an informed conclusion on the existence of a parole violation or the appropriateness of revocation. Application of the exclusionary rule to revocation hearings, however, would require parole authorities to master a complex body of constitutional law essentially unrelated either to the authorities' natural sphere of expertise or to the parolee's suitability for continued release. The government's substantial interest in preserving the expedition and relative informality of the parole revocation process would thus be undermined if parole authorities were required to entertain suppression motions based on alleged Fourth Amendment violations. Compare *Calandra*, 414 U.S. at 349-350; *Lopez-Mendoza*, 468 U.S. at 1048.[6]

b. The State's administration of its parole system involves "special needs, beyond the normal need for law enforcement." *Griffin*, 483 U.S. at 873. The underlying premise of maintaining close supervision of persons on parole is that persons released from prison are more likely to

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[6] Those burdens would not be significantly reduced by limiting the exclusionary rule to those situations in which the officer conducting the search "knows or has reason to know that the suspect is a parolee or probationer." Pet. App. 15a; see *id.* at 14a-15a (Pennsylvania Supreme Court acknowledges that "the harm to the parole revocation proceeding from application of the exclusionary rule remains the same whether or not the officer is aware of the parolee's status"). To the contrary, that limitation might actually make the suppression hearing more complicated and protracted by requiring the hearing board to determine not only the legality of the search, but the extent of the searching officer's (actual or constructive) knowledge of parolee status as well.

violate applicable restrictions than persons who have never been convicted of a crime. See *Morrissey*, 408 U.S. at 483 ("Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts."); *Griffin*, 483 U.S. at 880 ("it is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law"). Protection of the public against criminal acts by parolees can be accomplished only if parole can be revoked should the parolee violate the conditions of parole. There is consequently a particularly strong public interest in ensuring that the officials who oversee the system are apprised of complete and accurate information bearing on the parolee's continued suitability for release.[7]

"Revocation [of parole] deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on ob-

[7] The courts of appeals have consistently held that the exclusionary rule does not apply to federal sentencing proceedings. See, *e.g.*, *United States* v. *Kim*, 25 F.3d 1426, 1436 (9th Cir.), cert. denied, 513 U.S. 1030 (1994); *United States* v. *Montoya-Ortiz*, 7 F.3d 1171, 1181 (5th Cir. 1993); *United States* v. *Jenkins*, 4 F.3d 1338, 1344 (6th Cir. 1993), cert. denied, 511 U.S. 1034 (1994); *United States* v. *Tejada*, 956 F.2d 1256, 1260-1264 (2d Cir.), cert. denied, 506 U.S. 841, 920 (1992); *United States* v. *Lynch*, 934 F.2d 1226, 1234-1237 (11th Cir. 1991), cert. denied, 502 U.S. 1037 (1992); *United States* v. *McCrory*, 930 F.2d 63, 67-69 (D.C. Cir. 1991), cert. denied, 502 U.S. 1037 (1992); *United States* v. *Torres*, 926 F.2d 321, 322-325 (3d Cir. 1991). But see *United States* v. *Jewel*, 947 F.2d 224, 238-240 (7th Cir. 1991) (Easterbrook, J., concurring). If the exclusionary rule does not apply to the proceeding at which the length of a defendant's sentence is established, it would make little sense to apply the rule to a subsequent proceeding used to determine where a portion of that sentence will be served.

servance of special parole restrictions." *Morrissey*, 408 U.S. at 480. Respondent's release from prison was made contingent on his agreement to abide by several conditions, including a categorical prohibition on the ownership or possession of weapons. See *Commonwealth* v. *Williams*, 692 A.2d 1031, 1037 (Pa. 1997) (noting that, under Pennsylvania law, the "parolee acknowledges that he ha[s] read parole agreement, that he fully understands conditions of his parole and he agrees to follow such conditions"). Revocation of parole is properly regarded, not simply as a punishment of the parolee for the violation of its conditions, but as a means of protecting the community. Respondent should not be permitted to retain the benefits of parolee status, based on the asserted illegality of the search at issue here, when his failure to comply with the conditions of release indicates that he may pose a threat to the public welfare. Cf. *Lopez-Mendoza*, 468 U.S. at 1046 (noting that the Court "has never before accepted" the application of the exclusionary rule to "proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal").

II. WHERE A PAROLEE HAS CONSENTED TO SEARCHES AS A CONDITION OF PAROLE, THE FOURTH AMENDMENT DOES NOT REQUIRE INDIVIDUALIZED SUSPICION OF WRONGDOING TO JUSTIFY A SEARCH OF HIS RESIDENCE

In *Griffin* v. *Wisconsin*; 483 U.S. 868, 875-876 (1987), this Court upheld a warrantless search of a probationer's house based on a state regulation that permitted such searches where "reasonable grounds" existed to believe that contraband would be found. The Court did not adopt a "reasonable grounds" (or other individualized suspicion) requirement as a constitutional floor, and it did not con-

sider whether a person released on probation or parole could validly consent to searches without individualized suspicion as a condition of release. Under settled principles, however, such consent may justify searches of a parolee's residence, regardless of what the Fourth Amendment might otherwise require.

A. Constitutional Protections May Generally Be Waived In Exchange For Favorable Treatment From The Government

It is clear as a general matter that "a search conducted pursuant to a valid consent is constitutionally permissible," *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973), and that the validity of the search does not turn on the officers' possession of either individualized suspicion or a warrant. Accord, *e.g.*, *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990); *Zap* v. *United States*, 328 U.S. 624, 628 (1946). More generally, "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995); *Peretz* v. *United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are * * * subject to waiver.").

This Court has recognized, in particular, that an individual may, within broad limits, enter into arrangements with the government under which the individual relinquishes constitutional rights in return for a promise of favorable treatment. See, *e.g.*, *Zap*, 328 U.S. at 628 ("[W]hen petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts."). So long as the individual is accurately apprised of the options available to him, such agreements are generally enforce-

able even when the individual is forced to choose between unattractive alternatives. That principle is demonstrated most vividly by this Court's repeated recognition that the government may attempt through negotiation to persuade a defendant to plead guilty to a criminal charge. See, *e.g.*, *Mezzanatto*, 513 U.S. at 209-210 ("The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government may encourage a guilty plea by offering substantial benefits in return for the plea.") (internal quotation marks omitted); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) ("acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process"; defendant's plea held to be voluntary even though it "may have been induced * * * by fear of the possibility of a greater penalty upon conviction after a trial"); *Brady* v. *United States*, 397 U.S. 742, 755 (1970) ("[A] plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty.").

Much the same analysis applies to a consent to search entered into as a condition of release on parole. In *Griffin* v. *Wisconsin*, *supra*, this Court observed that "[p]robation is simply one point (or, more accurately, one set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service." 483 U.S. at 874. Nothing in the Constitution would prevent a criminal defendant from entering into a plea agreement that established not only the length of imprisonment to be served, but the nature of the facility in which that confinement would occur. If respondent could have entered into a plea agreement providing for confinement in a particular penal

institution, we see no reason that he could not also bargain for a less onerous punishment—*i.e.*, release into the community, subject to the condition that he could be searched at any time. Compare *People* v. *Bravo*, 43 Cal.3d 600, 609 (1987) ("A probationer's waiver of his Fourth Amendment rights [as a condition of release on probation] is no less voluntary than the waiver of rights by a defendant who pleads guilty to gain the benefits of a plea bargain."), cert. denied, 485 U.S. 904 (1988).

Relying on its decision in *Williams*, *supra*, the Supreme Court of Pennsylvania held that respondent's prior consent did not validate a search conducted without reasonable suspicion that respondent had committed a parole violation. Pet. App. 9a-10a.[8] The court in *Williams* as-

[8] The basis for the state court's holding is not altogether clear. The court's opinion might be read to hold simply that the parole conditions form signed by respondent, properly construed, furnished consent only to searches based upon reasonable suspicion. See Pet. App. 9a-10a (quoting *Williams*, 692 A.2d at 1036). We believe, however, that the court's resolution of the issue is more plausibly understood as resting on federal constitutional grounds. In *Williams*, the state court framed the question as "whether a parolee's Fourth Amendment rights have been violated by a warrantless search by his parole officer where the parolee has signed a consent form upon release." 692 A.2d at 1036. The court considered at length the pertinent decisions of other state courts, see *id.* at 1036-1037—decisions that would seem to have little relevance to the proper construction of the Pennsylvania form. The court concluded that a "middle ground" approach, under which warrantless searches would be permitted only if based on reasonable suspicion of parole violations, "comports with the Fourth Amendment protection afforded to parolees by the United States Supreme Court in *Griffin* * * * and in our sister states." *Id.* at 1037. Those passages suggest that, in the state court's view, even an unqualified consent to search executed as a condition of parole can justify a search, consistent with the Fourth Amendment, only where reasonable suspicion is present.

The court in *Williams* concluded that the search at issue had been based on reasonable suspicion of parole violations and was therefore

serted that such a limitation "protects the parolee by providing a check against state encroachment upon the parolee's limited Fourth Amendment right to be free from unreasonable searches." 692 A.2d at 1037. It is far from clear, however, that the long-term interests of potential parolees will actually be advanced by the limitation announced by the state court.

At least in a borderline case, conditions that enhance the State's ability to monitor its parolees may increase a parole board's willingness to release a prisoner into the community. Compare *Bravo*, 43 Cal.3d at 609 ("Were we to conclude that a probationer's waiver of Fourth Amendment rights were either impermissible or limited to

lawful. 692 A.2d at 1037-1038. The court then addressed the question whether Article I, Section 8 of the Pennsylvania Constitution required suppression of the evidence obtained during the search. See *id.* at 1038-1039. While recognizing that "Article I, Section 8 often provides greater protection" than the Fourth Amendment, *id.* at 1038, the court concluded that in the context of parolee searches no different standard was warranted, explaining that "[t]he policy concerns expressed above in the analysis of the legality of the search at issue under the Fourth Amendment also apply equally to consideration of the legality of the search under Article I, Section 8 of the Pennsylvania Constitution," *id.* at 1039.

Absent "a 'plain statement' that a decision rests upon adequate and independent state grounds," this Court has jurisdiction to review the issues of federal law presented by a case that originated in state court. *Michigan* v. *Long*, 463 U.S. 1032, 1042 (1983). Even where a state court's decision rests on both state and federal grounds, the Court has jurisdiction if it appears that the state court "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Id.* at 1043 n.8 (quoting *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977)). The Pennsylvania Supreme Court's opinions in the instant case and in *Williams* do not contain a plain statement that the court's resolution of the consent issue was based on state law grounds independent of Fourth Amendment concerns.

searches conducted only upon a reasonable-suspicion standard, the opportunity to choose probation might well be denied to many felons by judges whose willingness to offer the defendant probation in lieu of prison is predicated upon knowledge that the defendant will be subject to search at any time for a proper probation or law enforcement purpose."). As this Court observed in *Mezzanatto*, "[a] sounder way to encourage settlement is to permit the interested parties to enter into knowing and voluntary negotiations without any arbitrary limits on their bargaining chips. * * * A defendant can 'maximize' what he has to 'sell' only if he is permitted to offer what the prosecutor is most interested in buying." 513 U.S. at 208. Of course, the interests of a particular parolee, such as respondent, may be advanced if he is permitted to retain the benefit of his bargain (release on parole) while escaping its less attractive consequences (consent to searches). It does not follow, however, that limitations on the State's ability to insist on a more expansive consent to search can be expected to serve the interests of potential parolees as a class.

B. A Consent-To-Search Condition Enhances The State's Ability To Monitor Its Parolees' Compliance With The Terms Of Their Release, And Is Therefore Reasonably Related To The Benefit Provided To The Parolee

"Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the" right whose waiver is at issue. *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994). This Court's unconstitutional conditions jurisprudence suggests that a State may not

condition an individual's release on parole upon his agreement to forgo the exercise of a constitutional right —*e.g.*, the First Amendment right to engage in religious observance, or to make public statements critical of the government—that is wholly unrelated to his status as a parolee.

A requirement that parolees consent to search, by contrast, directly furthers the State's interest in the effective administration of its parole system, even where the State cannot demonstrate a particularized basis for suspecting an individual parolee of violating the conditions of his release. Parolees present a heightened risk of committing further criminal or other antisocial acts justifying close monitoring and supervision. See pages 19-20, *supra*. The purpose of conditional release is to assist in the prisoner's reintegration into the community, while minimizing the threat to the public safety and welfare that release may entail. The ability to conduct a search to assess the parolee's compliance with the conditions of his release is therefore reasonably related to the benefit offered by the government as a quid pro quo, even where state officials have no individualized basis for believing that a violation has occurred.

C. The Fact That A Potential Parolee Is Forced To Choose Between Unattractive Alternatives Does Not Render His Consent To Search Involuntary

A parolee's consent to search given as a condition of release is not rendered involuntary by the fact that the alternative is continued incarceration. It has been suggested that a potential parolee has no choice but to accept the consent-to-search provision.[9] That suggestion

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[9] See, *e.g.*, 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.10(b) at 135 (2d ed. 1987) ("to speak of consent in this context is to resort to a manifest fiction, for the

appears to rest on one of two propositions. First is the notion that an individual would not, under any circumstances, make a voluntary decision to accept a lengthy prison term. That proposition is false: criminal defendants can and often do enter into plea agreements that provide for substantial periods of incarceration, generally because they conclude that their alternatives are even more unattractive. This Court has repeatedly recognized that a plea of guilty is not rendered involuntary simply because it is motivated by a desire to avoid greater punishment. See page 23, *supra*.

The view that a parolee lacks any true choice in the matter may rest instead on the perception that no one would choose to spend time in prison *in preference to release on parole* because parole, even pursuant to a consent-to-search condition, is substantially less onerous than continued incarceration. That reasoning is also flawed. The government cannot be said to coerce an individual simply by presenting him with a choice in which one of the alternatives is plainly more advantageous than the other. No one would suggest, for example, that a defendant's plea of guilty is involuntary if the government offers him a favorable plea agreement. In short, no legal principle supports the view that an individual's waiver of constitutional rights is rendered unenforceable whenever the benefits of that waiver substantially outweigh its costs.

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probationer who purportedly waives his rights by accepting such a condition has little genuine option to refuse") (footnote and internal quotation marks omitted); *Commonwealth* v. *Walter*, 655 A.2d 554, 556 n.1 (Super. Ct.) ("Needless to say, there is no bargaining for terms of parole, nor is it likely that any prisoner is going to refuse parole simply because the terms are unfavorable."), appeal denied, 670 A.2d 141 (Pa. 1995).

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted.

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No. 97-581

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OCTOBER TERM, 1997

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v.

KEITH M. SCOTT,
Respondent.

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BRIEF OF CENTER FOR THE COMMUNITY INTEREST, ANTI-VIOLENCE PARTNERSHIP, JUSTICE FOR ALL, MARK KLAAS FOUNDATION FOR CHILDREN, NATIONAL ORGANIZATION OF PARENTS OF MURDERED CHILDREN, PARENTS OF MURDERED CHILDREN OF NEW YORK STATE, PAROLEWATCH, SAFE STREETS ALLIANCE, AND WOMEN AGAINST VIOLENCE AS AMICI CURIAE IN SUPPORT OF PETITIONER

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This amicus curiae brief is submitted in support of petitioner, the Pennsylvania Board of Probation and Parole. By letters filed with the Clerk of the Court, petitioner and

respondent have consented to the filing of this brief.[1]

INTEREST OF AMICI

The Center for the Community Interest, a project of the American Alliance for Rights and Responsibilities, and eight other community and victims' rights groups file this brief as amici curiae ("CCI and the crime victim groups") in support of the Pennsylvania Board of Probation and Parole (the "Board"). CCI is a national non-profit public interest organization founded to provide a voice for localities and community groups on public safety and quality-of-life issues. CCI helps cities, states, and civic associations to develop and defend policies that strike a reasonable balance between the rights of the individual and the needs of the larger community, addressing issues such as school violence, injunctions to control gangs, drug-related crime in low-income housing, and restrictions on aggressive panhandling. In doing this, CCI has developed a nationally recognized expertise on legal issues affecting the safety and quality of life of communities.

CCI has participated in a wide range of public safety and quality-of-life cases before this Court and other courts throughout the country.[2] In addition, it has represented crime

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[1] This brief was prepared in whole by the counsel listed on the cover. No person or entity, other than the amici curiae, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Most recently, CCI, as the American Alliance for Rights and Responsibilities, participated as amicus curiae before this Court in *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (defending civil commitment of (continued...)

victim groups in helping to sustain "Megan's Law" in the Second Circuit[3] and, in the Fifth Circuit, the right of crime victims to communicate with parole boards.[4]

CCI is extremely concerned that the decision of the Pennsylvania Supreme Court, if ratified by this Court, would dangerously restrict the ability of parole authorities across the country to supervise and monitor convicted criminals effectively and would thus compromise neighborhood safety. Moreover, as advocates for a reasonable and sensitive balance between individual liberties and public safety and strong believers in the goals of rehabilitation, CCI is concerned that the Pennsylvania court's decision will have the untoward effect of limiting the availability of parole for all offenders, including those who could be successfully reintegrated into the community.

CCI is joined as amici on this brief by eight anti-crime and victims' rights groups. The Marc Klaas Foundation for Children is a national non-profit group that is in the forefront of advocating child safety through education and public awareness programs. Mr. Klaas founded the group after the murder of his 12-year-old daughter, Polly, by a parolee. The National Organization of Parents of Murdered Children, Inc. provides emotional support to families and friends of homicide victims. Its programs include Parole Block, which

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[2] (...continued)
certain dangerous sexual offenders); *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996) (supporting reasonable restrictions on criminal defenses available to drunk drivers); *Bennis v. Michigan*, 116 S. Ct. 994 (1996) (defending asset forfeiture programs to control street prostitution).

[3] *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997), *petition for cert. filed* (U.S. Dec. 5, 1997) (No. 97-7023).

[4] *Johnson v. Rodriguez*, 110 F.3d 299 (5th Cir.), *cert. denied*, 118 S. Ct. 559 (1997).

has successfully campaigned to keep convicted murderers behind bars. ParoleWatch is a national non-profit program that utilizes the Internet to inform the public when violent felons are eligible for early release. The Safe Streets Alliance is a national organization that supports "truth in sentencing" laws and other measures to reduce violent crime.

The Anti-Violence Partnership is a non-profit organization that addresses violence in Philadelphia through victim services, crime prevention, and programs such as Families of Murder Victims and the Student Anti-Violence Education Program. Justice For All is dedicated to the support and promotion of crime prevention and public safety bills and the broadening of legal rights for the victims of sexual and violent crimes. Parents of Murdered Children of New York State, Inc. is a non-profit organization formed in 1983 by the parents of murder victims to protect the rights of victims of violent crimes. Women Against Violence is a non-partisan advocacy group for women crime victims devoted to research, education, and political action. As advocates for the victims of violent crime, many of whom have suffered at the hands of paroled offenders, the co-amici organizations share CCI's grave concerns about the implications of the Pennsylvania decision.

SUMMARY OF ARGUMENT

The warrantless, without reasonable suspicion ("suspicionless"), search of Scott's residence by parole officers pursuant to a consent condition of his parole raises an important Fourth Amendment issue that the Court should address. The Pennsylvania Supreme Court in this case and several other lower courts have held incorrectly that *Griffin v. Wisconsin*, 483 U.S. 868 (1987), establishes a reasonable suspicion standard for the constitutionality of searching a parolee's or probationer's residence. This issue is a matter of great significance to the day-to-day conduct of corrections authorities because the reasonable suspicion standard unnecessarily hampers the effectiveness of parole and probation ("community supervision") programs.

The legitimate interests test established by the Court in evaluating prison policies that allegedly infringe the constitutional rights of inmates should also be applied to parole policies. Community supervision is a variation on imprisonment and has become the primary means of punishing and monitoring criminals under sentence. Just as limitations on the constitutional rights of prisoners are justified in prisons by the need to deter crime, rehabilitate prisoners, and maintain institutional security, appropriate limitations are justified in probation and parole systems by the need to deter recidivism, monitor rehabilitation, and maintain community security. A deferential standard of review for determining the constitutionality of official policies is needed in both contexts.

Community supervision systems have a substantial interest in closely controlling and monitoring parolees and probationers, including through the use of policies authorizing warrantless, suspicionless searches. Many probation and parole programs are premised on the need to conduct warrantless, suspicionless searches, and these programs have been successful in reducing recidivism and deterring crime. The consent condition in Scott's parole form and the suspicionless search of his residence were part of an official policy of the Pennsylvania parole system and, as the experience of other community supervision programs evidences, advanced the legitimate interests of that system.

The search of Scott's residence was therefore reasonable, and did not violate the Fourth Amendment. For those reasons, the Court should reverse the Supreme Court of Pennsylvania.

ARGUMENT

CCI and the crime victim groups urge the Court to reverse the decision of the Pennsylvania Supreme Court and hold that the search of Scott's residence by Pennsylvania parole officers was reasonable and did not violate Scott's Fourth Amendment rights. We first explain the significant legal and practical reasons why the Court should decide the Fourth Amendment issue. We then show that the Court should apply the legitimate interests test from cases in the prison area to evaluate whether parole or probation policies violate a parolee's or probationer's constitutional rights. Application of that test demonstrates that warrantless, suspicionless searches are reasonably related to the legitimate interests of community supervision systems and therefore are reasonable under the Fourth Amendment. Finally, we explain that, under the legitimate interests test, the search of Scott's residence did not violate the Fourth Amendment.

I. THE COURT SHOULD DECIDE WHETHER THE SEARCH OF SCOTT'S RESIDENCE VIOLATED THE FOURTH AMENDMENT.

The Court should address the Fourth Amendment issue and hold that the search by the Pennsylvania parole officers did not violate Scott's Fourth Amendment rights. That decision would dispose of the need to resolve the principal question presented in this case concerning the

application of the exclusionary rule in parole revocation hearings[5] and, as we now describe, would have significant nationwide legal implications and consequences for the day-to-day operation of state and federal parole and probation systems.[6]

The Court should address the Fourth Amendment issue because the Pennsylvania Supreme Court in this case and other state and federal courts are misapplying this Court's *Griffin* decision.[7] *Griffin* held that a warrantless search of a probationer's residence was reasonable within the meaning of the Fourth Amendment because it was conducted pursuant to a valid regulation of a state's probation system, but many lower courts are reading *Griffin* to require that a search of a parolee, even one who consents to the search, must be based on reasonable suspicion to be reasonable under the Fourth Amendment.

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[5] The Court specifically invited briefing on the Fourth Amendment issue. Its order granting certiorari raised the following question: "Must a search of parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to the search as a condition of his parole?" *Pennsylvania Bd. of Probation and Parole v. Scott*, 60 U.S.L.W. 3385 (U.S. Nov. 26, 1997).

[6] For purposes of the issues discussed here, parole and probation systems should be treated similarly. *See United States v. Hill*, 967 F.2d 902, 909 (3d Cir. 1992) ("There is 'no constitutional difference between probation and parole for the purposes of the Fourth Amendment.'") (quoting *United States v. Harper*, 928 F.2d 894, 896 n.1 (9th Cir. 1991)); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.3 (1973) ("Despite the undoubted minor differences between probation and parole, the commentators have agreed that revocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole.").

[7] *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

For example, in this case, the Pennsylvania Supreme Court relied on one of its earlier decisions to determine that a suspicionless search of a parolee is not reasonable under the Fourth Amendment despite the existence of a consent to search as a condition of parole. The earlier decision cited *Griffin* and opinions of other state supreme courts construing *Griffin* to decide that a search of a parolee must be based on reasonable suspicion.[8] Two federal appeals courts reached the same conclusion.[9] This Court therefore needs to resolve the Fourth Amendment question in this case to eliminate the confusion among the lower courts about *Griffin* and the legal principles governing searches in community supervision programs.

This confusion would remain in many states even if the Court held that the exclusionary rule does not apply in parole revocation hearings. In these states, the state constitution requires revocation hearings to exclude evidence obtained in violation of the federal or state constitution.[10]

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[8] *Scott v. Pennsylvania Bd. of Probation and Parole*, 698 A.2d 32, 36 (Pa. 1997) (applying *Commonwealth v. Williams*, 692 A.2d 1031 (Pa. 1997)). In *Williams*, the court said: "We believe that this 'middle ground' approach to warrantless searches pursuant to a signed parole agreement comports with the Fourth Amendment protection afforded to parolees by the United States Supreme Court in *Griffin* . . . and in our sister states." 692 A.2d at 1036-37 (citing *Williams v. State*, 902 S.W.2d 767 (Ark.), *cert. denied*, 116 S. Ct. 676 (1995); *Pena v. State*, 792 P.2d 1352 (Wyo. 1990); *State v. Johnson*, 748 P.2d 1069 (Utah 1987)).

[9] *United States v. Davis*, 932 F.2d 752, 758 (9th Cir. 1991) ("The permissible bounds of probation search are governed by a reasonable suspicion standard."); *United States v. Giannetta*, 909 F.2d 571, 576 (1st Cir. 1990) (holding that search of probationer without reasonable suspicion "conflict[ed] with the dictates of *Griffin*").

[10] *See, e.g., State v. Cross*, 487 So. 2d 1056 (Fla. 1986); *Amiss v.* (continued...)

Thus, the Court should decide the Fourth Amendment issue to clarify that the search of Scott's residence was not impermissible under the United States Constitution and that the results of the search do not need to be excluded for that reason.

Finally, as we discuss in more detail below, the standard for applying the Fourth Amendment to community supervision systems is a matter of great significance to the day-to-day conduct of corrections authorities. Requiring reasonable suspicion as a basis for conducting a parole search, even when the parolee has consented to the search, unnecessarily hampers the effectiveness of community supervision programs and impairs law enforcement efforts.

II. THE POLICY OF THE BOARD AUTHORIZING WARRANTLESS, SUSPICIONLESS SEARCHES OF PAROLEES IS VALID UNDER THE FOURTH AMENDMENT BECAUSE IT IS REASONABLY RELATED TO LEGITIMATE PAROLE INTERESTS.

CCI and the crime victim groups urge the Court to hold that the Board's policy authorizing warrantless, suspicionless searches of parolees is constitutional. The Court should reach this holding by applying the legitimate interests test currently used to assess prison policies that allegedly infringe the constitutional rights of prisoners. Under this standard of review, a community supervision

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[10] (...continued)
State, 219 S.E.2d 28 (Ga. 1975); *State ex rel. Juvenile Dep't v. Rogers*, 836 P.2d 127 (Or. 1992); *Mason v. State*, 838 S.W.2d 657 (Tex. 1992); *State v. Lampman*, 724 P.2d 1092 (Wash. 1986).

policy is constitutionally valid, and a search pursuant to the policy is reasonable under the Fourth Amendment, if it is reasonably related to legitimate community supervision interests. Warrantless, suspicionless searches of supervisees more than satisfy the reasonable relationship requirement because strict controls and effective monitoring systems are a crucial part of deterring recidivism by criminals under sentence, whether the sentence is being served within or outside of prison walls.

A. The Court Should Evaluate Alleged Constitutional Infringements in Parole Programs Under the Standard It Applies to Prison Regulations and Policies.

The Court should use the occasion of this case to apply to community supervision programs the legitimate interests test it uses to evaluate allegations that official conduct pursuant to a prison regulation or policy infringed an inmate's constitutional rights. In *Griffin*, the Court alluded to this possibility but did not decide whether the test should be applied to probation or parole regulations.[11] As we now describe, the same reasons and concerns that led the Court to adopt the legitimate interests test in the prison context apply equally in the parole and probation context.

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[11] *Griffin*, 483 U.S. at 874 n.2.

1. *The Legitimate Interests Test Should Apply Because Community Supervision and Prison Have Similar Problems and Objectives.*

The Court's approach in prison cases, when an inmate alleges that a prison regulation or policy infringes a constitutional right, is to find that the regulation or policy "is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). The legitimate interests test balances the need to protect the constitutional rights of prisoners with the recognition that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," which are "not readily susceptible of resolution by decree." *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974), *overruled on other grounds*, *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

For several reasons, the Court should apply the same approach to community supervision policies, such as the policy of conducting warrantless, suspicionless searches in this case, when a supervisee claims a constitutional infringement. First, the Court has always recognized that probation and parole are variations on imprisonment.[12] The similarity between community supervision and prison is reflected in the fact that probationers and parolees have only a conditional liberty interest dependent on observance of

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[12] *Id.* at 874 ("Probation, like incarceration, is 'a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea guilty' . . . .") (quoting G. Killinger et al., *Probation and Parole in the Criminal Justice System* 14 (1976)); *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) ("Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals.").

special restrictions.[13]

Second, parole and probation are increasingly replacing the use of prisons as the primary method of punishing criminals,[14] in large part as a result of decreasing prison space[15] and escalating prison costs.[16] The total number of people under community supervision has risen dramatically in recent years. Over seventy-three percent of convicted criminals currently under sentence are on the

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[13] *Griffin*, 483 U.S. at 874 ("To a greater or lesser degree, it is always true of probationers (as we have said it is true of parolees) that they do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.'") (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

[14] *See* Joan Petersilia, *A Crime Control Rationale for Reinvesting in Community Corrections*, 75 Prison J. 479, 480-81 (1995); Dale G. Parent et al., National Inst. of Justice, U.S. Dep't of Justice, *Responding to Probation and Parole Violations*, July 1994, at 1 (hereinafter "*Responding to Probation and Parole Violations*").

[15] Prison populations have increased dramatically leading to a serious overcrowding problem. *See, e.g.*, Bureau of Justice Statistics, U.S. Dep't of Justice, *Correctional Populations in the United States, 1995* (May 1997), at 5 (hereinafter "Bureau of Justice Statistics") (121 percent increase in prison populations from 1985 to 1995); *see also* Kerry L. Pyle, Note, *Prison Employment: A Long-Term Solution to the Overcrowding Crisis*, 77 B.U. L. Rev. 151, 152 (1997) (discussing problem of prison overcrowding).

[16] Nationally, the total spent on corrections in fiscal year 1995 exceeded $21 billion, three times the expenditures from the early 1980s. *See* Mark A.R. Kleinman et al., BOTEC Analysis Corp., Massachusetts Inst. for a New Commonwealth, *Criminal Justice in Massachusetts: Putting Crime Control First*, Oct. 1996, at 20 (hereinafter "*Crim. Justice in Mass.*").

streets under some type of community supervision.[17] In 1985, approximately 2.3 million people were under community supervision. By 1995, that number had increased to almost 3.8 million.[18]

Similarly, the increased reliance on community supervision means that more violent offenders currently under sentence live in our communities.[19] The number of people sentenced to community supervision in lieu of prison for commission of a violent crime, that is, homicide, sexual assault, robbery, and assault, jumped forty-five percent from 1989 to 1993.[20] Also, offenders on parole and probation often are serial offenders, who commit a disproportionate number of violent crimes.[21]

Third, the objectives of community supervision are substantially similar to the objectives of prisons. Just as the limitation on the constitutional rights of prisoners is justified in prisons by the need to deter crime, rehabilitate prisoners, and maintain institutional security,[22] appropriate limitations are justified in probation and parole systems by the need to

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[17] Ed Barajas, *Freeing the Invisible Giant*, State Gov't News, Aug. 1997, at 17.

[18] Bureau of Justice Statistics, *supra*, at 5, 38, 128.

[19] *See* Petersilia, *supra*, at 480-81.

[20] *See* John J. DiIulio, Jr., *Reinventing Parole and Probation*, Brookings Rev., March 22, 1997, at 40.

[21] *See* David Kennedy, *Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 Val. U. L. Rev. 449, 459-60 (1997) ("Much of our crime problem is due to serial offenders who commit a wide variety of offenses; consistently abuse alcohol and other drugs; . . . are often arrested, often on probation and parole, and often incarcerated.").

[22] *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987).

deter recidivism, monitor rehabilitation, and maintain community security.[23] "The fact that most active offenders are not in prison, but instead on probation or parole, means that these community corrections agencies are potentially central in a serious crime-control strategy." *Crim. Justice in Mass.*, *supra*, at 22.

Fourth, because of the explosive growth in the community supervision population, strict controls and effective oversight are needed to meet the objectives of community supervision. Probation and parole agencies need the authority to impose intensive supervision because, when supervision is not adequate, more crime occurs, rehabilitation fails, and recidivism increases. Failed parolees and probationers account for the fastest growing segment of the prison population and thirty to fifty percent of all new prison inmates,[24] escalating the vicious cycle that requires parole and probation as substitutes for prisons.

In sum, the explosive growth of the probation and parole systems in the United States over the past twenty years has led to the same type of "complex and intractable" problems that this Court recognized in the prison system and that led to the legitimate interests test for evaluating prison policies allegedly violating a prisoner's constitutional rights.[25] The running of a prison is "an inordinately difficult

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[23] *See Griffin*, 483 U.S. at 875 ("[Probation] restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large."); *Crim. Justice in Mass.*, *supra*, at 20 (goals of probation and parole include deterring recidivism, rehabilitating offender, and protecting community).

[24] *See* Petersilia, *supra*, at 482-83.

[25] *See Procunier*, 416 U.S. at 405.

undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner*, 482 U.S. at 84-85. It is hard to imagine a better description of the running of a modern community supervision system, and therefore the Court should apply the legitimate interests test in the community supervision context as well.

2. *The Same Prudential Reasons That Led to the Adoption of the Legitimate Interests Test in the Prison Context Apply to Community Supervision Programs.*

The Court also has had several prudential reasons for applying the legitimate interests test to prison regulations. The same prudential considerations urge application of the test to parole and probation.

First, the Court has sought to grant prison officials appropriate deference to ensure that they had discretion to adopt innovative solutions without fear of judicial interference.[26] Parole and probation authorities need the same deference and discretion to provide innovative and effective community supervision. For example, in appropriate cases, they should be free to adopt a practice of requiring routine polygraph testing or questioning without the threat of Fifth Amendment challenges. They should also be able to force sexual predators on parole or probation to refrain from owning pornography despite alleged First Amendment concerns. Subjecting these and other conditions to rigorous

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[26] *See O'Lone*, 482 U.S. at 349-50.

constitutional scrutiny would undermine the ability of authorities to fulfill their obligation to protect communities.

Second, the Court has adopted the legitimate interests test in prison cases to clarify the discretionary authority of prison officials and end the burgeoning litigation of constitutional claims by inmates.[27] According the proper deference and discretion to parole and probation officials similarly would allow the courts to avoid a series of cases alleging comparable claims.

B. The Legitimate Interests of Community Supervision Require Intensive Monitoring, Including Policies of Conducting Warrantless, Suspicionless Searches of Supervisees.

In this part of the brief, we first explain that the legitimate interests test may be applied to a supervisee's Fourth Amendment claim. Next, we discuss the four-factor approach the Court has developed to apply the legitimate interests test to official prison conduct and the ways to adapt that approach to probation and parole cases. We then apply the factors to warrantless, suspicionless searches to show that such searches are reasonably related to the legitimate interests of community supervision.

The legitimate interests test can and should be used to review Fourth Amendment as well as other constitutional claims asserted by a parolee or a probationer. Although

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[27] *See Bell v. Wolfish*, 441 U.S. 520, 523 (1979) (noting that Court had "several decisions consider[ing] constitutional challenges to prison conditions or practices by convicted prisoners" in previous five terms).

Fourth Amendment issues do not arise in prison cases,[28] they do arise in community supervision cases because, under *Griffin*, "[a] probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" 483 U.S. at 873. *Griffin* applied the balancing test used to assess "special needs" situations, where the warrant and probable cause requirements are impracticable, such as a state's operation of a school or a government office or its supervision of a regulated industry.[29] CCI and the crime victim groups believe, however, that a more deferential standard of review, the legitimate interests test, should be applied to determine what is reasonable under the Fourth Amendment in the community supervision context.[30]

1. *The Court Should Adapt the Factors Used in Applying the Legitimate Interests Test in Prison Cases to Community Supervision Cases.*

The factors used to apply the legitimate interests test to prison regulations and policies should be used, with appropriate modifications, to evaluate constitutional challenges to official conduct in parole and probation cases. The *Turner* court set out four factors to use in evaluating whether a challenged regulation or policy is "reasonably

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[28] *See Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (holding prisoner has no reasonable expectation of privacy in prison cell).

[29] *See Griffin*, 483 U.S. at 873.

[30] *Griffin*'s holding that the Wisconsin statute was constitutional under the "special needs" standard does not foreclose the possibility that the more deferential legitimate interests test should apply in this case.

related" to legitimate interests: first, whether a rational connection exists between the regulation or policy and the legitimate governmental interest invoked as a justification for the action; second, whether alternative means of exercising the right allegedly being infringed remain open for the inmate; third, whether accommodation of the right allegedly being infringed will have an adverse impact on guards, other inmates, and prison resources; and finally, whether obvious, easy alternatives to the regulation or policy exist.[31]

Although the factors are specific to "prisoner rights" litigation,[32] they provide substantial guidance on how to establish the "reasonably related" connection in community supervision litigation. The "rational connection," "alternative means," and "easy alternative factors" are all relevant in deciding whether a regulation or policy of a community supervision system is reasonably related to the legitimate interests of the system and therefore constitutional. The "adverse impact" factor is more specifically tailored to a prison setting, but could be adapted to involve an evaluation of whether the accommodation of a right will have an adverse impact on the relevant community.

Although prisons and community supervision systems have similar legitimate interests and courts should apply similar factors in evaluating whether a regulation or policy is reasonably related to those legitimate interests, this does not mean that a court would necessarily reach the same conclusion concerning the validity of a regulation or policy affecting prisoners and community supervisees. For example, in *O'Lone*, this Court held that a prison policy affecting the ability of Muslim inmates to attend religious services was

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31 *Turner*, 482 U.S. at 89-90.

32 *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989).

reasonably related to legitimate penological interests.[33] It is less likely that a policy decision having a similar effect on a group of probationers or parolees would satisfy the "reasonably related" factors. The factors need to be applied on a case-by-case basis with the relevant differences between prisons and community supervision systems taken into account.

2. *Consideration of the Requisite Factors Demonstrates That a Policy Decision To Conduct Warrantless, Suspicionless Searches Is Reasonably Related to the Legitimate Interests of Community Supervision.*

A policy decision to conduct warrantless, suspicionless searches, when examined using the requisite factors, is reasonably related to the legitimate interests of community supervision. The essential premise is that effective community supervision programs require extremely close monitoring and control of probationers and parolees.[34] Thus, a policy of conducting warrantless, suspicionless searches has a compelling, and not merely a rational, connection to the legitimate interests of community supervision.

"The key concept in community corrections is

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33 482 U.S. at 353.

34 *See, e.g.*, Petersilia, *supra*, at 488 (noting "emerging consensus" on moving toward intensive supervision in monitoring of community supervisees); Ed Barajas, *Community Justice: Bad Ways of Promoting a Good Idea*, Perspectives, Summer 1997, at 18 (noting need for intermediate sanctions).

'intermediate sanctions,' programs that provide more intensive supervision—more punishment, more control, and perhaps more rehabilitation—than conventional probation or parole, but cost less than imprisonment." *Crim. Justice in Mass.*, *supra*, at 22-23. Intensive supervision is a flexible concept, generally providing for a wide variety of rigorous conditions aimed at closely monitoring the daily activities of the supervisees.[35]

"[S]olid empirical evidence" proves the benefits of intensive supervision.[36] Programs involving strict conditions, intensive surveillance, and mandatory treatment have proven effective in lowering recidivism.[37]

As more states and localities have recognized the need for intensive supervision programs, they have begun to implement these programs to meet the goals of community supervision. The most innovative and successful of these programs use warrantless, suspicionless searches to oversee the activities of their supervisees.

For example, Oregon has developed a program called

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[35] *See* Joan Petersilia & Susan Turner, *Evaluating Intensive Supervision Probation/Parole: Results of a Nationwide Experiment*, May 1993, at 1.

[36] *See* Petersilia, *supra*, at 489.

[37] *See id.*; Todd R. Clear & Anthony A. Braga, *Community Corrections, in Crime* 421, 427 (James Q. Wilson & Joan Petersilia eds., 1995). Although some studies have shown that intensive supervision programs have on occasion failed to meet their stated goals, more recent studies have concluded that the programs generally failed because governments did not commit the requisite resources to administer the programs effectively. *See* Petersilia, *supra*, at 489; National Inst. of Justice, U.S. Dep't of Justice, *Impact of Systemwide Drug Testing in Multnomah County, Oregon* (June 1995). Thus, what were intended to be intermediate sanctions, in practice, did not provide any more surveillance than traditional community supervision. *See* Petersilia, *supra*.

"Drug Reduction on Probation" based on the use of frequent, random drug testing as an effective monitoring tool.[38] Oregon combines drug testing with automatic short and immediate jail stints for failed tests.[39] "Practitioners believe that the [program has] reduced the number and rate of third and subsequent failed drug-use tests." *Responding to Probation and Parole Violations*, *supra*, at 19. One county reported that the program reduced the percentage of positive random drug tests from sixty-one to fifteen percent.

Localities in Boston have implemented two innovative programs to stop crime among gang members by targeting known offenders under supervision with intensive surveillance. Operation Ceasefire began in 1996 as an attempt to intervene in gang areas with recent histories of violent homicides.[40] The strategy, in part, uses various surveillance methods by community supervisors, including frequent home visits and random stops, to create a "heavy police presence."[41]

Similarly, Operation Night Light, a connected program, coordinates the efforts of community supervisors and police to ensure that juveniles under community supervision obey the conditions of their supervision.[42] Supervisors use random home visits to look for the individual, area inspections, and random spot searches to

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[38] *See Responding to Probation and Parole Violations, supra,* at 19.

[39] *See id.* at 20.

[40] *See* Kennedy, *supra*, at 463.

[41] *See id.*

[42] *See* Ronald P. Corbett et al., *Operation Night Light: An Emerging Model for Police-Probation Partnership, Invitation to Change: 1996 Better Government Competition on Public Safety* 105, 109 (1996).

control their supervisees' activities.[43]

The success of these Boston programs has been dramatic. In the short time the programs have existed, youth violence in Boston has dropped significantly.[44] President Clinton noted the merits of Boston's creative solutions to violence, saying "[w]e want to give every city the tools to do what Boston has done." *Boston's 'Magic' Formula*, Boston Herald, Feb. 20, 1997, at O24.

Another effective program using intrusive methods of surveillance monitors sexual predators on lifetime probation in Arizona. This program uses periodic polygraph tests, home searches, and plethysmorgraph testing to monitor the probationers. The continuous observation of these offenders has led to a remarkably low recidivism rate of 1.4 percent.[45] Other jurisdictions view Arizona's approach as a model to follow.[46] The success of all of these innovative programs depends upon the ability to use intrusive surveillance, demonstrating the necessary rational connection between warrantless, suspicionless searches and the legitimate interests of community supervision systems.

Two other factors in the "reasonably related" test also indicate that warrantless, suspicionless searches are reasonably related to the legitimate interests of community supervision. Not allowing warrantless, suspicionless searches of a supervisee's home would have an adverse impact on the

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[43] *See id.* at 111, 114.

[44] For an in-depth look at Operation Night Light and its success, see *Operation Night Light, supra*. A complete description and discussion of Operation Ceasefire can be found in Kennedy, *supra*, at 463-68.

[45] *See* Karine Bland, *Arizona Tough on Child-Sex Offenders, New Law Allows Life Sentences*, Ariz. Republic, Apr. 21, 1997, at A1.

[46] *See id.*

community, as demonstrated by the successful lowering of recidivism rates accomplished by the programs utilizing the warrantless, suspicionless searches described above. In addition, there are no easy alternatives to a home search for determining many types of violations of supervision conditions. As the Ninth Circuit stated in upholding warrantless, suspicionless searches of parolees' homes:

> [I]t may be impossible to determine whether a parolee is using alcohol or narcotics, whether he is keeping weapons or contraband in his home, whether he is using or preparing to use his home as a base for improper or unlawful activities, whether he is making a real effort to obtain employment, or the general nature of his home environment, without conducting some type of search."

Latta v. Fitzharris, 521 F.2d 246, 250 (9th Cir. 1975) (*en banc*). The element of surprise and the deterrence effect created by suspicionless searches are extremely important aspects of a successful monitoring program.

The final factor, whether alternative means for exercising the right remain open to the community supervisee, is difficult to apply in the Fourth Amendment context because the constitutional right provides that a person cannot be searched in certain circumstances. This means that it is unlikely that a person has an alternative method of exercising a Fourth Amendment right when officials need to conduct a search in a particular manner and do not have an easy alternative consistent with the purposes and policies of the community supervision program. Nonetheless, as long as a warrantless, suspicionless search is pursuant to and part of a valid community supervision system, overall consideration of the four factors indicates that the search is reasonably related

to legitimate parole interests.

As in *Griffin*, the appropriate Fourth Amendment protection for community supervisees is that searches be "reasonable." The legitimate interests test gives probation and parole officials more flexibility to define what is reasonable and confirms that warrantless, suspicionless searches in accordance with the policies and objectives of a community supervision program are reasonable under the Fourth Amendment.

C. The Warrantless, Suspicionless Search of Scott's Residence Satisfies the Legitimate Interests Test.

We now apply the legitimate interests test described above to the search of Scott's residence. As the prison cases show, the test can be applied to a parole policy decision as well as a formal parole regulation. The Court has acknowledged that both the "policies and practices" of prison administrators should be accorded considerable deference.[47] Although *Turner* addressed prison regulations promulgated by the Missouri Department of Corrections, the Court suggested that the legitimate interests test applies to all prison regulations or policies, including the "day-to-day judgments of prison officials." 482 U.S. at 89. Several lower courts have agreed that the standard of review should be applied to all actions taken by prison officials.[48] In *Lane v. Griffin*, 834

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[47] *See Bell*, 441 U.S. at 547.

[48] *See also Schenk v. Edwards*, 921 F. Supp. 679, 684 (E.D. Wash. 1996) (written or unwritten prison policy prohibiting certain inmate interaction subject to legitimate interests test); *Frink v. Arnold*, 842 F. (continued...)

F.2d 403 (4th Cir. 1987), Justice Powell sitting by designation stated:

> The fact that the restriction at issue here arose from a policy decision made by the superintendent of the prison, rather than a regulation, does not require a different analysis. . . . [T]he reasons articulated by the Court in *Turner* and *O'Lone* for applying a 'reasonably related' standard to prison regulations apply with equal force to a policy decision made by a prison official.

Id. at 406 (upholding restriction on ability of inmate to offer religious service). Just as in the prison context, policy decisions by parole officials should also be subject to the legitimate interests test.

The search of Scott's residence by state parole officers was pursuant to a policy of the Pennsylvania parole system. The Board authorized both the inclusion of the search consent as a condition of the terms of Scott's parole and the subsequent warrantless, suspicionless search of Scott's residence. As noted by the Supreme Court of Pennsylvania, "the General Assembly has given the Parole Board broad powers to supervise a parolee and to impose regulations on a parolee's conduct upon release that the Commonwealth could not impose on ordinary citizens." *Commonwealth v. Williams*, 692 A.2d 1031, 1036 (Pa. 1997). The applicable Pennsylvania statute states that, "[i]n addition to the power to make general rules and regulations hereby granted, the [Parole] board may . . . prescribe special regulations for

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[48] (...continued)
Supp. 1184, 1188 (S.D. Iowa), *aff'd*, 43 F.3d 673 (8th Cir. 1994) (applying legitimate interests test to unwritten prison policy governing inappropriate writings).

particular parolees." 61 Pa. Cons. Stat. § 331.23 (1996). A parolee must abide by any conditions imposed by the Parole Board and a violation of the conditions may cause his detention or return to a correctional institute. 37 Pa. Code §§ 63.3, 63.5(a).

As part of its special regulations power, the Board included the search consent as one of the conditions in its pre-printed "Conditions Governing Parole/Reparole" form. J.A. 7a. A prisoner could not go on parole without agreeing to the conditions.

As Agent Mundro testified at Scott's parole revocation hearing, the agents' understanding of their search powers under the special condition were that Scott's approved residence could be searched without his permission. *Scott v. Pennsylvania Bd. of Probation and Parole*, 668 A.2d 590, 595 (Pa. Commw. Ct. 1995). At the time of the search of Scott's residence, Pennsylvania had no controlling legislative, administrative, or judicial precedent limiting a reasonable search of a parolee conducted pursuant to a consent condition other than the limitation that a search be in connection with verifying and effectuating compliance with the conditions of parolee. As evidenced by the facts in this case, the Board and its agents, as a matter of policy and practice, defined "reasonable" to include without reasonable suspicion.

The Board's decision to use its special conditions power to create a search consent condition allowing for suspicionless searches is exactly the type of policy decision that courts have subjected to the legitimate interests test in prison cases and therefore is entitled to deference here. As explained in Section II(B), a warrantless, suspicionless search of a parolee conducted pursuant to a parole policy or regulation is reasonably related to the legitimate interests of a parole system. The search of Scott's residence satisfied these

requirements, was reasonable, and did not violate the Fourth Amendment. The Court therefore should hold that the evidence of Scott's parole violation was lawfully obtained.

III. EVEN IF THE COURT DOES NOT ADOPT THE LEGITIMATE INTERESTS TEST, THE SEARCH OF SCOTT'S RESIDENCE WAS REASONABLE UNDER THE FOURTH AMENDMENT.

Even if the Court declines to adopt the legitimate interests test, it still should find that the search of Scott's residence pursuant to Scott's search consent was constitutional under *Griffin*'s balancing test. For the reasons discussed in Section II of this brief, the state's need for effective methods to solve the problems of community supervision far outweighs the limited expectation of privacy held by probationers and parolees. Consented searches without reasonable suspicion satisfy the reasonableness requirement of the Fourth Amendment in the context of community supervision even if the legitimate interests test is not applied to parole cases. We defer to the fuller discussion of this argument and related points in the brief of the Board and the brief for the United States as amicus curiae.

CONCLUSION

For the foregoing reasons, the Court should decide that the Board's search of Scott's residence did not violate his Fourth Amendment rights and that the evidence obtained during the search was not required to be excluded from his

parole revocation hearing. It therefore should reverse the decision of the Pennsylvania Supreme Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PENNSYLVANIA BOARD OF PROBATION AND PAROLE,

Petitioner,

vs.

KEITH M. SCOTT,

Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Must a search of a parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PENNSYLVANIA BOARD OF PROBATION AND PAROLE,

Petitioner,

vs.

KEITH M. SCOTT,

Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petitioner. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The Pennsylvania Supreme Court excluded the evidence in this case despite a valid, voluntary consent to search. This holding will unduly hamper the supervision of parolees and result in the unnecessary exclusion of valid, probative evidence. This is contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

January, 1998

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

SUMMARY OF FACTS AND CASE

In 1982, Keith M. Scott pled *nolo contendere* to third degree murder.[1] *Scott* v. *Pennsylvania Bd. of Probation*, 698 A. 2d 32, 32 (Pa. 1997). He "was sentenced to a ten to twenty year term of imprisonment." *Ibid.* After he finished the minimum sentence allowed, he was given the opportunity to be released on parole. *Ibid.* If released on parole, he would be subject to certain conditions. *Ibid.* One of these conditions allowed the warrantless search of his person, property or residence. *Ibid.* On September 1, 1993, Scott accepted these conditions and was released on parole. *Scott*, 698 A. 2d, at 32-33. In return, he avoided incarceration for another ten years. See *id.*, at 32.

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

On February 4, 1994, Scott was arrested for a variety of parole violations.[2] *Id.*, at 33. While Scott was being taken to the Monroe County Correctional Facility, two agents went to his residence. *Ibid.* As Scott resided with his mother and stepfather, the agents waited for the return of Scott's mother, who had been notified that the agents were at her house. *Ibid.* After she arrived, she directed the agents to her son's room. *Ibid.* A search of the room revealed no evidence of parole violations. *Ibid.* However, in the adjacent room, the agents found five firearms and a compound bow and arrow. *Ibid.*

A parole violation hearing was held on March 30, 1994. *Ibid.* The evidence seized during the search was admitted, and on June 6, 1994, Scott was recommitted to serve 36 months. *Id.*, at 34. Scott first sought administrative relief from the Pennsylvania Board of Probation and Parole which was denied. *Ibid.* He then appealed to the Commonwealth Court. *Ibid.* The Commonwealth Court reversed and remanded, agreeing with the defense that the evidence seized during the search of Scott's residence violated his Fourth Amendment rights. *Ibid.*

The decision was appealed to the Pennsylvania Supreme Court. *Ibid.* That court, relying on *Commonwealth* v. *Williams*, 692 A. 2d 1031 (Pa. 1997), see 698 A. 2d, at 35-36, held that "when an officer is aware or has reason to be aware of a suspect's parole or probationary status, he must have reasonable suspicion of a parole violation in order to conduct a search. If reasonable suspicion does not exist, the exclusionary rule will apply in the parole revocation hearing." *Id.*, at 38. Applying this rule, the court concluded that the search violated Scott's Fourth Amendment rights and that the exclusionary rule should apply. *Id.*, at 39.

The Pennsylvania Board of Probation and Parole then petitioned this Court for a Writ of Certiorari. The Court granted review limited to question one of the petition on November 26,

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2. The most serious of these violations included possession of a firearm and engaging in "assaultive behavior." *Id.*, at 33.

1997. This question asked whether the exclusionary rule applies to parole revocation hearings. In addition, the Court also requested briefing on this question: "Must a search of a parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole?" *Amicus* CJLF will limit its argument to the second question.

SUMMARY OF ARGUMENT

Well-established principles should not be overlooked in the glare of new trends. An over-reliance on the "special needs" analysis caused the Pennsylvania Supreme Court to sidestep the consent exception. This firmly established exception effectively protects the Fourth Amendment guarantees and should be the analysis used to justify the search. To meet Fourth Amendment requirements, consent simply needs to be voluntary. A review of the facts, case law and analogous situations supports the voluntariness of the consent given by Scott to the Pennsylvania Board of Probation and Parole. The bargain reached between the parties should be given effect.

This analysis should not be disrupted by the extension of the unconstitutional conditions doctrine to the Fourth Amendment. The doctrine finds its roots in the First Amendment and should be limited to that basis. Allowing the doctrine to go beyond its natural boundaries will only harm those it seeks to protect by depriving them of the opportunity for release and will quite literally "imprison a man in his privileges and call it the Constitution." See *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 280 (1942).

ARGUMENT

I. This case can and should be decided on the consent exception.

In the present case, the Pennsylvania Supreme Court held that parolees have "a Fourth Amendment right against unreasonable searches and seizures that is unaffected by his signing of [a] consent to search provision." *Scott* v. *Pennsylvania Bd. of Probation,* 698 A. 2d 32, 36 (Pa. 1997). To reach this conclusion, the court relied on *Commonwealth* v. *Williams*, 692 A. 2d 1031 (Pa. 1997). In *Williams*, the court had concluded that a signed parole provision was a mere acknowledgment that "agents of the Parole Board could conduct a warrantless search of his premises." *Id.*, at 1037. These decisions strip the consent of any true effect and fail to faithfully recognize the body of law supporting the consent exception to the Fourth Amendment.

From these conclusions, the decision then relied on "special needs" principles to determine the legality of the search. This requires balancing governmental interests against the parolee's privacy interests, trying to reach the perfect "middle ground." See *Scott*, 698 A. 2d, at 36. The mixture of consent principles and "special needs" analysis in the decision illuminates a basic misunderstanding of these exceptions and the Fourth Amendment analysis.

The Fourth Amendment guarantees all individuals the right to be free from "unreasonable searches and seizures." U. S. Const., Amdt. 4. Generally, searches conducted without probable cause and a search warrant are *per se* unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U. S. 347, 357 (1967). "Special needs" is one such emerging exception. See, *e.g.*, *Vernonia School District 47J* v. *Acton*, 515 U. S. 646, 653 (1995); *Griffin* v. *Wisconsin*, 483 U. S. 868, 873 (1987). Another entirely separate, firmly established exception is consent. See, *e.g.*, *Ohio* v. *Robinette*, 519 U. S. ___, 136 L. Ed. 2d 347, 355, 117 S. Ct. 417, 421 (1996); *Florida* v. *Bostick*, 501 U. S. 429, 434 (1991); *Illinois* v. *Rodriguez*, 497

U. S. 177, 179 (1990); *Florida* v. *Royer* 460 U. S. 491, 497 (1983); *United States* v. *Mendenhall*, 446 U. S. 544, 557-560 (1980); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 219 (1973); *Davis* v. *United States*, 328 U. S. 582, 593-594 (1946); *Zap* v. *United States*, 328 U. S. 624, 630 (1946).

Under the "special needs" exception, a search is reasonable only after a balancing of the interests involved justifies the intrusion. For example, in *Vernonia*, *supra*, the search was deemed reasonable after considering "the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search." 515 U. S., at 664-665.

In some circumstances, individualized suspicion may be required to make the search "reasonable" under the Fourth Amendment. See *O'Connor* v. *Ortega*, 480 U. S. 709, 726 (1987) (offices of government employees) (plurality); *New Jersey* v. *T.L.O*, 469 U. S. 325, 342, n. 8 (1985) (school lockers). For example, in *New Jersey* v. *T.L.O.*, the search was conducted only after a teacher suspected the student of violating a school rule. 469 U. S., at 328. However, the "special needs" exception does not always require individualized suspicion. See *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 560-561 (1976) (border patrol checkpoints) ("the Fourth Amendment imposes no irreducible requirement of such suspicion"); see also *Vernonia*, *supra*, 515 U. S., at 664-665 (student athletes); *National Treasury Employees Union* v. *Von Raab*, 489 U. S. 656, 665 (1989) (United States Customs Service employees); *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 618-624 (1989) (railroad employees). Furthermore, in *O'Connor* and *T.L.O.*, the Court deliberately left unanswered what level of suspicion was required to meet constitutional muster absent those particular facts. *O'Connor*, 480 U. S., at 726; *T.L.O.*, 469 U. S., at 342, n. 8. Thus, these cases establish only that the degree of suspicion presented by their facts was sufficient, not that it was necessary.

Similarly, the "reasonable suspicion" standard, in the present case, which stems from a regulation found in *Griffin* v.

Wisconsin, is not required. In *Griffin*, this Court, using a "special needs" analysis, upheld a warrantless probation search. *Griffin*, *supra*, 483 U. S., at 880. A Wisconsin regulatory scheme permitted warrantless searches when a probation officer had "reasonable grounds" to believe the probationer violated probation. See *id.*, at 870-871; see also Wis. Stat. § 973.10(1) (1985-1986); Wis. Admin. Code HHS §§ 328.21(4), 328.16(1) (1981). After recognizing the "special needs" of the probation system justified the departure from the usual warrant and probable cause requirement, the Court concluded the search was " 'reasonable' . . . because it was conducted pursuant to a valid regulation governing probationers." *Griffin*, 483 U. S., at 880. This conclusion does not determine whether the regulation's standard is the minimum standard required.

Just because a state regulatory scheme withstands constitutional attack does not mean the state's scheme is the new standard. For example, under Kentucky law, a defendant can collaterally attack the constitutionality of prior convictions when he is charged as a persistent felony offender. *Parke* v. *Raley*, 506 U. S. 20, 22 (1992). Under Kentucky's procedures, courts use a burden-shifting rule when a transcript of the plea proceeding is unavailable to determine the validity of a prior conviction. See *id.*, at 23-24. The constitutionality of this rule was questioned in *Parke* and this Court concluded that "Kentucky's burden-shifting rule easily passes constitutional muster." *Id.*, at 28. This holding did not create a right to collaterally attack prior convictions. It also did not dictate that the courts that allow attacks must use Kentucky's burden-shifting rule. It simply held Kentucky's method did not violate the Constitution.

The Court subsequently determined in *Custis* v. *United States*, 511 U. S. 485 (1994) that entertaining collateral attacks on prior convictions is not required *at all*, with the exception of *Gideon* claims. *Id.*, at 487. Analogously, *Griffin*'s holding that a "reasonable grounds" regulation "passes constitutional muster" (in *Parke*'s words) does not amount to a holding that "reasonable grounds" are required.

Following a "special needs" analysis would require the Court to address this unanswered question. The Court would also have to consider whether a consent provision is an appropriate starting point for a "special needs" analysis. Basing the analysis on a consent provision is questionable and leads to obviously flawed results. The new rule adopted by the Pennsylvania court illustrates this point.

Under the rule, the parolee's consent is given no real effect. It simply acts as a springboard to get to the "special needs" analysis. Once there, a search will only be deemed reasonable if the parole officer conducting the search has a "reasonable suspicion that the parolee had committed a parole violation." *Scott*, *supra*, 698 A. 2d, at 36. This less-than-probable cause standard is justified by the parolee's lower expectation of privacy and the "special needs" of the parole system. The analysis diminishes the strength that should be given to the parolee's consent and results in additional safeguards protecting parolee's privacy interests. A voluntary consent alone makes a search reasonable for the average citizen. *Robinette*, *supra*, 136 L. Ed. 2d, at 355, 117 S. Ct., at 421 (no additional level of suspicion required beyond the detainee's voluntary consent). However, for a parolee, under the Pennsylvania court's new rule, a search is only reasonable if the parolee voluntarily signs a consent provision *and* the officer has reasonable suspicion for the search. Clearly, this cannot be correct. It makes the level of protection *higher* for parolees than for law-abiding citizens. "Special needs" analysis and consent analysis are distinct and should not be confused. Where both apply, a search is valid if it meets either test.

Recognizing that it is the Court's practice to dispose of claims on the simplest grounds available, *amicus* submits that this case is more simply resolved on consent. Cf. *Strickland* v. *Washington*, 466 U. S. 668, 697 (1984) ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed"). Under the consent exception, a search is reasonable if the consent justifying the search is

"freely and voluntarily given." *Bumper* v. *North Carolina*, 391 U. S. 543, 548 (1968). This analysis will only require the Court to address the voluntariness of the consent given. Accordingly, this exception will limit the analysis necessary and will avoid the detailed balancing of interests required by the "special needs" exception.

II. The consent analysis justifies the warrantless search of Scott's residence.

A. Voluntary Consent.

Consent will only meet Fourth Amendment requirements if it is voluntary. *Bumper* v. *North Carolina*, 391 U. S. 543, 548 (1968). However, as *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 224 (1973) recognized, there cannot be a "talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen." Rather, "the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Id.*, at 227.

In coming to this conclusion, the *Schneckloth* Court rejected more restrictive approaches to the consent analysis. Refusing to adopt a *Miranda*-type approach to these situations, the Court explained that "voluntariness" does not require that an individual's "knowledge of a right to refuse" be demonstrated in order for the consent to be valid. *Id.*, at 234. The Court also rejected a "strict standard of waiver" approach, see *id.*, at 241, recognizing that the "protections of the Fourth Amendment are of a wholly different order." *Id.*, at 242. The Court explained that "the Fourth Amendment protects the 'security of one's privacy against *arbitrary* intrusion by the police . . . .' " *Ibid.* (quoting *Wolf* v. *Colorado*, 338 U. S. 25, 27 (1949)) (emphasis added). Since "there is nothing constitutionally suspect in a person's voluntarily allowing a search," the Court refused to require a

"knowing and intelligent" waiver standard for a consent search. *Schneckloth*, 412 U. S., at 243, 246.

Illinois v. *Rodriguez*, 497 U. S. 177 (1990) reinforces the proposition that a strict standard of waiver is not necessary to protect Fourth Amendment guarantees. In *Rodriguez*, the Court was asked to determine "[w]hether a warrantless entry is valid when based upon consent of a third party whom the police, at the time of entry, reasonably believe to possess common authority over the premises, but who in fact does not do so. *Id.*, at 179. The Court explained that the issue "raised is not whether the right to be free of searches has been *waived*, but whether the right to be free of *unreasonable* searches has been *violated*." *Id.*, at 187 (emphasis in original). If the Court had limited its analysis to who actually possessed authority over the premises, the search would have seemingly been unreasonable, as that person did not consent to the search. This result would have given the consent the effect of a waiver, a result the Court has repeatedly rejected. See, *e.g.*, *Schneckloth*, 412 U. S., at 246.

In the present case, the question is not whether Scott validly waived his rights. Rather, the Court must decide if the parole search was reasonable. The consent given by Scott makes this search reasonable, and the voluntariness of the consent ensures the Fourth Amendment guarantees are not violated. Voluntariness is a flexible concept. *Id.*, at 224. It acts as a backdrop that structures the analysis, but only after a "careful sifting of the unique facts and circumstances" will its presence be revealed. *Id.*, at 233.

Davis v. *United States*, 328 U. S. 582 (1946) is an example of the type of analysis courts should engage in to determine whether a search was made pursuant to a valid consent. *Davis* involved the consensual search of an office for gasoline ration coupons. See *id.*, at 586-587. The petitioner was convicted of unlawful possession of gasoline ration coupons after the District Court concluded that "the petitioner had consented to the search and seizure and that his consent was voluntary." *Id.*, at 587.

The Court of Appeal affirmed, basing its decision on a "search incident to arrest" rationale. *Ibid.* The Supreme Court returned to the consent analysis, finding it unnecessary to reach the alternative analysis engaged in by the Court of Appeals. *Id.*, at 594.

In evaluating the voluntariness of the consent, the Court looked to the totality of the circumstances surrounding the search. The Court relied on the "public character of the property, the fact that the demand was made during business hours at the place of business where the coupons were required to be kept, the existence of the right to inspect, the nature of the request, [and] the fact that the initial refusal to turn the coupons over was soon followed by acquiescence in the demand" to support the conclusion that the consent was voluntarily given. *Id.*, at 593. The Court further explained that "[t]he nature of the coupons is important here merely as indicating that the officers did not exceed the permissible limits of persuasions in obtaining them." *Id.*, at 591. The Court relied on the fact that the circumstances drove the choice rendered by Davis, not the actions of the officers.

Davis chose to engage in the gasoline business during World War II, when gasoline was scarce, strategically important, and strictly rationed. As part of his business, he had public documents that were required to be turned over to the government. *Id.*, at 588-589. Yet he still chose to go into that business. Davis may have wanted different options. For example, he may have wanted to have free rein to do as he pleased with his gasoline business. However, the circumstances did not allow this. Even with the contraints on his choice, the Court concluded he could consent to the search for ration coupons, *id.*, at 587, 593-594, a consent the Court deemed voluntary. *Id.*, at 593-594.

Scott, like Davis, had a choice. Just as Davis agreed to give up some of his privacy to work in the gasoline business, Scott agreed to give up some of his privacy to gain parole. Just like Davis, Scott's choice was not free from constraints. He may

have wanted different options. However, the circumstances did not allow this. The circumstances inevitably drove his choice. This does not effect his ability to voluntarily consent. This review of the bargain struck between Scott and the probation board reveals the voluntariness of the parolee's consent and the absence of a Fourth Amendment violation.

B. Precedent Supports the Voluntariness of the Bargain Reached.

This Court's precedents further support the voluntariness of the bargain reached between Scott and the probation board. The Court has recognized an individual's ability to consent in advance to warrantless searches, *Zap* v. *United States*, 328 U. S. 624 (1946), and also to voluntarily agree to a bargain that provides only two undesirable options. *Bordenkircher* v. *Hayes*, 434 U. S. 357, 363 (1978). These holdings further demonstrate that the consent given by Scott to the warrantless search of his property was voluntary and thereby reasonable under the Fourth Amendment.

Zap remains valid authority for the consent exception, see, *e.g.*, *Vale* v. *Louisiana*, 399 U. S. 30, 35 (1970), and should control the outcome of the present case. In *Zap*, the Court upheld the search of an individual's business based on a previously obtained consent. Zap had entered into a contract with the Navy "under which he was to do experimental work on airplane wings and to conduct test flights." *Zap*, 328 U. S., at 626. The contract required that "[t]he accounts and records of the contractor shall be open at all times to the Government and its representatives . . . ." *Id.*, at 627. In 1942, Zap's books and records were audited by agents of the Federal Bureau of Investigation. *Ibid.* These agents acted pursuant to the Navy Department's authority. *Ibid.* From this audit, the agents recovered a check for $4,000, *ibid.*, made out to a test pilot, that was used by Zap to defraud expense money from the government. *Id.*, at 626. Zap moved to have the check "stricken on the ground that it had been illegally seized." *Id.*, at 628. The Court concluded that "[t]he search and the discovery were

wholly lawful" relying on the petitioner's consent. *Id.*, at 630. The Court explained that "when petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had . . . ." *Id.*, at 628.

Under *Zap*, the consent to warrantless searches agreed to by Scott made the search reasonable under the Fourth Amendment. Like Zap, Scott was not required to accept the government's contract. He was simply given the option. Zap chose to accept the contract and its condition in order to receive the Navy's business. Scott, likewise, chose to accept the parole board's contract and conditions to avoid serving the remainder of his sentence inside prison. The bargain struck between the Navy and Zap was given effect. The bargain between Scott and the probation board should be given similar effect.

This Court has long recognized the validity of mutually beneficial consents and should continue to give individuals the benefit of their bargains. See, *e.g.*, *Ruckelshaus* v. *Monsanto*, 467 U. S. 986, 1007 (1984) (the Court concluded that "a voluntary submission of the data by an applicant in exchange for the economic advantages of a registration" did not violate the Taking Clause of the Fifth Amendment); *Bordenkircher*, 434 U. S., at 363. The plea bargain is particularly analogous to the present situation. As the validity and voluntariness of plea agreements have long been recognized by the Court, *Bordenkircher*, 434 U. S., at 363, this analogy is persuasive evidence that the bargain struck between Scott and the probation board was consensual.

Plea bargains come in the face of substantial state power, and the defendants are often faced with dire possibilities if they go to trial. Yet this Court has affirmed that the valid consent necessary for a bargain can be obtained. A plea agreement is even recognized as "an essential component of the administration of justice . . . . [and] is to be encouraged." *Santobello* v. *New York*, 404 U. S. 257, 260 (1971).

"Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Bordenkircher*, 434 U. S., at 363. This mutual advantage supports the consensual character of the plea agreement. The *Bordenkircher* facts further illuminate this point. In *Bordenkircher*, the prosecution threatened to charge the defendant as an habitual criminal if he did not " 'save the court the inconvenience and necessity of a trial.' " *Id.*, at 358. As a habitual criminal, the defendant could receive a life sentence. *Id.*, at 358-359. If he accepted the plea agreement and pled guilty to the crime charged, the sentence would only be two to ten years in prison. *Id.*, at 358. When defendant refused to accept the bargain, the prosecutor carried out his threat, and defendant was convicted and received a life sentence. *Id.*, at 359. This Court upheld the sentence, allowing prosecutors to present defendants with such "unpleasant alternatives . . . ." *Id.*, at 365. This "acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process." *Id.*, at 363.

Scott was given two alternatives: remain in prison or accept the parole conditions. Neither alternative is pleasant. However, like the plea-bargaining defendant, a prisoner can choose between the two alternatives, and this choice is voluntary.

III. The doctrine of unconstitutional conditions should be limited to the First Amendment, leaving the consent analysis undisturbed.

The only potential threat to the applicability of the consent exception to these facts would be the extension of the unconstitutional conditions doctrine to the Fourth Amendment. The unconstitutional conditions doctrine instructs that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . ." *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972). If this doctrine were

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In The
SUPREME COURT OF THE UNITED STATES
October Term 1997

PENNSYLVANIA BOARD OF
PROBATION AND PAROLE,

Petitioner,

v.

KEITH M. SCOTT,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF 33 STATES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

(1) Must a search of a parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of parole?

(2) Whether the exclusionary rule applies to parole revocation proceedings?

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to be expanded, a person in Scott's position might argue that the bargain violated the doctrine as it required him to give up his right to be free from "unreasonable searches and seizures" in order to receive parole. Application of this doctrine would question the validity of the bargain struck between Scott and the probation board.

Amicus submits that this is a difficult, potentially dangerous doctrine that should be confined to the First Amendment. Expansion of this doctrine to the Fourth Amendment would only serve to disrupt established precedent and in the end would strip individuals of the benefit of their bargains. Confining the doctrine to its First Amendment roots, will prevent this disruptive result.[3]

A. First Amendment Roots.

In *Perry* v. *Sindermann*, 408 U. S. 593 (1972), this Court formulated a dictum that should not be allowed to govern the present case. The *Perry* Court was confronted with a claim by a nontenured junior college teacher that his contract was not renewed because he publicly criticized his superiors. This failure to renew was claimed to violate his First Amendment rights. *Id.*, at 595.

In holding that Sindermann's lack of tenure did not bar his First Amendment claim, the *Perry* Court made the following pronouncement:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes

3. This issue has not arisen in the briefing up to this point. *Amicus* CJLF is raising the question and answering it preemptively, because it appears to be the only colorable argument against the validity of the consent and because *amici* are not permitted to file reply briefs. See Supreme Court Rule 37.3(a).

> his constitutionally protected interests—especially, his interest in freedom of speech." *Id.*, at 597.

To the extent that it goes beyond the First Amendment, this statement is dictum. *Perry* was a First Amendment case. Whether the unconstitutional conditions benefits doctrine applied beyond the First Amendment was not an issue. As the present case does not involve an attempt by the government to purchase an individual's First Amendment rights, *Perry* and its ilk do not apply.

The limit of this dictum is seen in *Perry* itself. *Perry* was a First Amendment case dealing with an alleged denial of employment because of the employee's exercise of his free speech rights. As the *Perry* Court recognized, the First Amendment was at the heart of the denial of government benefits doctrine. Thus, the *Perry* doctrine was "especially" concerned with protecting the employee's "interest in freedom of speech." *Ibid.*

The First Amendment limits of *Perry* are further reinforced by the authorities it cites. None of the authorities cited by *Perry* involved denying a government benefit for the exercise of a right outside the First Amendment. Several cases cited by *Perry* did not involve conditioning benefits on giving up some other right, but instead involved denials of benefits that were directly challenged as unconstitutional. See *Shapiro* v. *Thompson*, 394 U. S. 618, 627 (1969) (one-year residence requirement for welfare payments violates equal protection); *Graham* v. *Richardson*, 403 U. S. 365, 376 (1971) (denial of welfare to aliens violates equal protection); *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 894 (1961) (denial of cook's access to military installation did not violate due process). Other cases cited by *Perry* involved loyalty oaths. Some invoked the First Amendment and others the due process "vagueness" doctrine, but all involved a severe impact on speech or association. See *Whitehill* v. *Elkins*, 389 U. S. 54, 59-62 (1967); *Baggett* v. *Bullitt*, 377 U. S. 360, 372 (1964); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 287-288 (1961); *Speiser* v. *Randall*, 357

U. S. 513, 529 (1958); *Wieman* v. *Updegraff*, 344 U. S. 183, 185-186, 191-192 (1952). The other cases involved a variety of First Amendment issues. See *Pickering* v. *Board of Education*, 391 U. S. 563, 574-575 (1968) (speech); *United States* v. *Robel*, 389 U. S. 258, 266-268 (1967) (association); *Keyishian* v. *Board of Regents*, 385 U. S. 589, 608-609 (1967) (association); *Elfbrandt* v. *Russell*, 384 U. S. 11, 16 (1966) (association); *Sherbert* v. *Verner*, 374 U. S. 398, 405-406 (1963) (free exercise of religion); *Torcaso* v. *Watkins*, 367 U. S. 488, 494-496 (1961) (establishment of religion); *Shelton* v. *Tucker*, 364 U. S. 479, 490 (1960) (association); *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100 (1947) (partisan speech and association). See *Perry*, *supra*, 408 U. S., at 597. *Perry* had no support to extend its reach beyond the First Amendment. "It is to the holdings of our cases, rather than their dicta, that we must attend . . . ." *Kokkonen* v. *Guardian Life Ins.*, 511 U. S. 375, 379 (1994).

Other decisions reinforce the First Amendment limits on *Perry*. Although this Court made a similarly expansive statement in *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540 (1983),[4] the only authority it cites to support this claim is *Perry*, a First Amendment case. See *id.*, at 545. Furthermore, *Taxation With Representation* is itself a First Amendment case. See *ibid.* Any implication that *Perry* extends beyond the First Amendment is dictum.

Other decisions demonstrate the First Amendment limits of *Perry* more directly. In *Connick* v. *Myers*, 461 U. S. 138 (1983), this Court traced the development of the rights of public employees. It noted that initially, "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Id.*, at 143. The *Connick* Court then traced the history of the public employee

4. "[T]he government may not deny a benefit to a person because he exercises a constitutional right." 461 U. S., at 545.

rights cases, see *id.*, at 144, and came to the following conclusion. "In *all* of these cases, the precedents in which *Pickering* [v. *Board of Education*, 391 U. S. 563 (1968)] is rooted, the invalidated statutes and actions sought to suppress the rights of public employees *to participate in public affairs*." 461 U. S., at 144-145 (emphasis added). *Perry*, one of *Pickering*'s "progeny," *id.*, at 143, and n. 4, stands for the principle that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Id.*, at 142. This is the proper limit of *Perry*.

More recent pronouncements from this Court have also recognized that the unconstitutional conditions doctrine is an aspect of the First Amendment. "[O]ur modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes on his constitutionally protected . . . freedom of speech . . . .' " *Board of County Commissioners* v. *Umbehr*, 518 U. S. ___, 135 L. Ed. 2d 843, 851, 116 S. Ct. 2342, 2347 (1996) (quoting *Perry*, *supra*, 408 U. S., at 597). Recognizing that the primary purpose of the government employee cases was the protection of a core First Amendment right, "speech on matters of public concern," *Connick*, *supra*, 461 U. S., at 145, the limits of *Perry* are not beyond, but are instead within, the First Amendment.

There are good reasons for these limits. Many constitutional rights outside the First Amendment have been waived in exchange for government benefits. It thus would be impractical and dangerous to now endanger these agreements. So long as it does not suppress ideas, the government may place conditions on "benefits."

> "*Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, *government officials*

> *should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary* in the name of the First Amendment." *Id.*, at 146 (emphasis added, footnote omitted).

The Fourth Amendment protections do not deal with the suppression of ideas and therefore should not be subject to the *Perry* dictum. Whatever may be the actual scope of *Perry*, "its antecedents, and its progeny," the doctrine of these decisions does not apply to the present case.

B. The Detrimental Effect on the Bargaining Process.

As the plea bargain is an essential tool of the criminal justice system, see *ante*, at 12-13, so too is consent. Extension of the unconstitutional conditions doctrine would strip our probation and parole systems of this essential tool. Limiting the doctrine to its First Amendment roots will prevent this result and allow the bargaining process to achieve its important goals.

The bargaining process can serve essential functions. See *ante*, at 11-13. In *Ruckelshaus*, for example, the Environmental Protection Agency gained an important tool that helped monitor the pesticide industry in exchange for the economic advantages associated with registration with the agency. *Ruckelshaus* v. *Monsanto*, 467 U. S. 986, 1007 (1984). The unconstitutional conditions doctrine was not permitted to disturb this mutually beneficial bargain or the ones seen in *Bordenkircher* and *Zap*. See *ante*, at 11-13. Limiting the doctrine to the First Amendment helps explain why this Court has upheld such constitutional bargaining when First Amendment rights are not involved.

Furthermore, as Justice Holmes noted in his *Western Union* dissent, the doctrine has logical difficulties. *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 53 (1910). Justice Holmes explained that "[e]ven in the law the whole generally includes its parts. If the state may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way." *Ibid.* So long as the decision to accept the benefit is voluntary, then an

individual should be able to consent to foregoing a constitutional right in exchange for some government benefit.

If the government is not allowed to condition a benefit, it may withdraw or modify the benefit to the detriment of both the government and the beneficiary. There is already widespread public dissatisfaction with parole and pressure to reduce or eliminate it. See, *e.g.*, Fisher, Changing Pennsylvania's Sentencing Philosophy Through the Elimination of Parole for Violent Offenders, 5 Widener J. Pub. L. 269, 294-295 (1996) (proposal to eliminate parole for violent offenders). Limitation on the ability to search parolees and the consequent reduction in public safety can only add to this pressure. In turn, the government and society would be disadvantaged as our prison system would see increased burdens.

In 1994, 690,159 people were on parole and 2,964,171 were on probation. U. S. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1995, p. 540 (1996). The loss of this bargaining process would clearly have an enormous effect on our correctional institutions as the government, in light of this public dissatisfaction, may limit the number of grants of parole and probation. Like the required submission of data in *Ruckelshaus*, warrantless consent searches help monitor those in our parole and probation systems. Supervision of these individuals is an important duty of our probation and parole boards, especially, in light of the research, recognized by this Court, which "suggests that more intensive supervision can reduce recidivism." *Griffin* v. *Wisconsin*, 483 U. S. 868, 875 (1987) (citing Petersilia, Probation and Felony Offenders, 49 Fed. Probation 9 (June 1985)). Without the tools that aid our probation and parole boards in their supervisory tasks, the bargaining process ends. Not only will the government lose the benefits of these types of bargains, the eligible inmates will also lose the benefit of living outside prison walls until their sentences expire. The extension of the unconstitutional conditions doctrine will quite literally "imprison a man in his privileges and call it the Constitution." See *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 280 (1942). Limiting the

doctrine is the only way to prevent this detrimental effect on the bargaining process and truly uphold our Constitution. The unconstitutional conditions doctrine should not apply to this case. The consent is voluntary. That is enough, by itself, to make the search reasonable within the meaning of the Fourth Amendment.

CONCLUSION

The decision of the Pennsylvania Supreme Court should be reversed.

January, 1998

Respectfully submitted,

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STATEMENT OF *AMICI* INTEREST

Ohio and 32 other States write to urge the Court to reverse the decision below and to explain why this case matters not just to Pennsylvania but to her sister States as well.

At stake are two principles of law: (1) whether law enforcement officers need reasonable suspicion to search the residence of a parolee or probationer who has consented to future searches as a condition of early release, and (2) whether in the alternative the exclusionary rule should be extended to parole revocation proceedings. On both points, the States have significant reliance interests. They have long conditioned the early release of prisoners on the waiver of Fourth Amendment rights, and few (if any) State courts have customarily extended the exclusionary rule to parole revocation proceedings.

The States have a considerable interest in the efficient operation of their probation and parole systems. The availability of parole provides a useful tool for rehabilitating certain offenders and for preserving scarce prison space for other offenders who for one reason or another continue to pose a danger to the public. All 50 States and the federal government have some form of early release program. And approximately three-quarters of all adult offenders participate in some form of conditional release while serving a criminal sentence. J. Gobert & N. Cohen: *The Law of Probation and Parole*, § 1.01 (1983).

Parole programs also present unique administrative challenges. Officials must make inherently difficult decisions, balancing the prospect that the rehabilitation of offenders will be furthered by supervised release against the risk that they could exploit their freedom to break the law again. *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 422 U.S. 1, 8-9 (1979). *See also*

Griffin v. Wisconsin, 483 U.S. 868, 873-875 (1987); *Morrisey v. Brewer*, 408 U.S. 471, 483-484 (1972).

Making these decisions more difficult still is the frequency with which they must be made. The number of probationers and parolees has increased by more than two-thirds since 1987, from 1,798,390 to 2,999,287. As a result, the average case load of probation officers has risen from 111 to 301 offenders, a 179% increase, while the average case load of parole officers has risen from 94 to 164, a 74% growth. Criminal Justice Institute, Inc.: *The Corrections Yearbook* (1988), 68, 69, 72, 73; *The Corrections Yearbook* (1997), 140-141,148.

These same officials also have been asked to supervise an increasingly difficult group of criminals. Due in large part to increasingly overcrowded prisons, the percentage of felons in early-release programs has increased from approximately 10% in the 1950's to almost 60% today. C. Lindner & R. Bonn, *Probation Officer Victimization and Field Work Practice: Results of a National Study*, Federal Probation, June 1996, 16; Bureau of Justice Statistics, U.S. Dep't of Justice, T. Bonczar, *Characteristics of Adults on Probation*, Dec. 1997, 1, 3. Plus, more and more offenders with drug abuse, mental health needs and other problems are being given early release, many of whom require significant resources to supervise. Lindner & Bonn, *supra*; M. Bork, *Five Year Review of United States Probation Data, 1990-1994*, Federal Probation, December 1995, 27, 29; Bonczar, *supra* at 2; Lindner, *supra* at 17; J. Denzlinger & D. Miller, *The Federal Probation Officer: Life Before and After Guideline Sentencing*, Federal Probation, Dec. 1991, 49.

Probation and parole agencies have tried to meet these challenges in a variety of ways. As an initial matter, they have increased standards of professionalism. Accrediting

requirements and codes of ethics have been established at the same time that educational prerequisites and in-service training have been increased. R. Lawrence, *Professionals or Judicial Civil Servants*, Federal Probation, Sept. 1994, 14; American Correctional Association: *Standards for Adult Probation and Parole Field Services*, (2d ed, 1981, supplemented 1996). For example, a four-year degree is now a minimum requirement for probation and parole officers and many agencies require a Master's Degree. R. Lawrence, *supra*, at 14. States also require an average of 234 hours of specialized training before a new officer can undertake his or her duties and an average of 41 hours of continuing education each year thereafter. Criminal Justice Institute: *The Corrections Yearbook 1997*, 177. These standards have become so well established as to be a requirement for accreditation. *Standards for Adult Probation*, Nos. 2-3041, 2-3060, 2-3060-1, 2-3065, 2-3069, 2-3070.

Notwithstanding these innovations, the most important tools for meeting these diverse challenges continue to be active oversight of offenders' adjustment to release. Only by following a convict's activities outside the prison can the caseworker ensure that the premise of early release -- that the offender no longer poses a threat to public safety -- remains warranted. As one leading commentator on the subject has explained:

> To fulfill these functions, the parole or probation officer needs considerable investigative leeway. While some information can be garnered from discussions with the offender and the offender's friends, associates, employees, and relatives, other data regarding the person's home life and behavior may not be available from these sources. Investigation

> of the offender's home, possessions, and body may also be required. In such situations, parole and probation officers believe that they need to be able to make unannounced home visits and searches. Often this authority is expressly written into the conditions of release. Even absent a search condition, the nature of the caseworker-offender relationship, and the reduced expectation of privacy which comes from being a probationer or parolee, may implicitly permit such searches. In any event, many parole and probation officers think these searches are necessary and often exercise their prerogative to conduct searches.

J. Gobert & N. Cohen, *supra* at § 8.02 (emphasis added, footnotes omitted).

Authority to conduct such searches, in the aftermath of consent given to make them as a condition of early release, has long been allowed under lower court decisions construing the Fourth Amendment. And, to our knowledge, most States follow the practice of requiring consents to search before offering early release. *See* S. Kneafsey, *The Fourth Amendment Rights of Probationers: What Remains After Waiving Their Right To Be Free From Unreasonable Searches and Seizures?* 35 Santa Clara. L. Rev. 1237, 1249 (1995); *see also Owens v. Kelly* 681 F.2d 1362, 1366-1369 (11th Cir. 1982) (collecting cases).

SUMMARY OF ARGUMENT

In suppressing evidence of a parole violation committed by Mr. Scott, the Pennsylvania Supreme Court erred in two respects. It found that the parole officers

needed reasonable suspicion to search his residence when Mr. Scott had previously consented to such searches as a condition of obtaining a discretionary early release. And it compounded the error by extending the exclusionary rule to the administrative setting of parole (and presumably probation) revocation proceedings.

1. The lower court's first conclusion does not rest on an independent and adequate State ground. While some ambiguity exists concerning the State or federal root of the Pennsylvania Supreme Court's analysis -- did the lower court mean to construe the effect of the waiver as a matter of State law or Fourth Amendment law? -- the court nowhere provides the requisite clear statement needed to insulate this component of the decision from federal review. *See Michigan v. Long*, 463 U.S. 1032 (1983).

The States do not violate -- indeed, they respect -- the Fourth Amendment's prohibition against "unreasonable searches and seizures" when they obtain consent to search an individual's residence. They may obtain such consents on a case-by-case basis, *see Schneckloth v. Bustamonte*, 412 U.S. 218 (1972); and they may do so globally, *see Wyman v. James*, 400 U.S. 309 (1971), *Zap v. United States*, 328 U.S. 624 (1946), *vacated on other grounds*, 330 U.S. 800 (1947). And, above all, they may do so in return for extending a discretionary governmental benefit to which future searches are reasonably related. *See, e.g., Wyman*; *Zap*. So long as government does not put the individual in a position in which "one constitutional right should have to be surrendered in order to assert another," *Simmons v. United States*, 390 U.S. 377 (1968), so long in other words as the government does not bend the will of the individual, *see Schneckloth*, it may permissibly extend discretionary benefits on a conditional basis.

Pennsylvania acted well within these restrictions here. At the time Mr Scott signed the consent form to future searches of his residence by parole officials, he was being extended an opportunity to leave a setting in which random searches are already permitted, waiver or not. *See Hudson v. Palmer*, 468 U.S. 517, 529 (1984). Plainly, the consent requirement was reasonable, and the bargain legitimate. The whole point of carefully monitoring those who have not yet served out the full term of their sentence is to ensure that the premise of early release -- that the offender has proceeded far enough down the path of rehabilitations as no longer to pose a threat to public safety -- remains warranted. The State merely placed an eminently sensible restriction on the terms of Mr. Scott's release, one that it was no less entitled to impose than he was entitled to reject. If there is doubt here, it is whether Pennsylvania overprotected Mr. Scott's rights, not whether it violated them. Under a series of decisions that arise in administrative settings that like this one implicate a host of public safety concerns, it would seem that Pennsylvania had every right to engage in this type of limited search of the residence of their parolees with or without their consent. *See Veronia School Dist. 47J v. Alton*, 115 S. Ct. 2386 (1995); *National Treasury Employee Union v. Von Raab*, 489 U.S. 656 (1989); *Camara v. Municipal Court*, 387 U.S. 523 (1967). Yet the Court need not reach that broader issue since Pennsylvania in fact obtained Mr. Scott's consent.

2. Even if the Pennsylvania Supreme Court correctly found a Fourth Amendment violation, it erred in extending the exclusionary rule to the administrative setting of a parole revocation hearing. The "pragmatic" explanation for imposing an exclusionary rule in criminal trials, primarily the goal of deterrence, *Stone v. Powell*, 428 U.S. 465, 488 (1976), does not carry over to the rehabilitative and public-safety considerations that dominate a State's complex

determination whether to allow a law breaker to leave prison early. The Court has never extended the exclusionary rule beyond the criminal trial (and direct appeal), and in point of fact has rejected requests to extend the rule to grand jury proceedings, the impeachment of criminal defendants, administrative proceedings, civil proceedings commenced by another sovereign, and habeas review of State-court criminal convictions.

The rule is a "grudgingly taken medicant" of which "no more should be swallowed than is needed." *United States v. Janis*, 428 U.S. 433, 454 n.29. And no such medicine is needed here. The exclusion of evidence used to show whether the hopeful assumptions about Mr. Scott's rehabilitation remain true (they do not, it turns out) have no meaningful parallel to the question whether wrongfully-obtained evidence may be used to convict an individual in the first instance. It is one thing to use such evidence to overcome the presumption of a citizen's innocence. Yet it is quite another to use it to determine whether the presumptive public-safety risk of allowing a convict's early release continues to be worth taking.

ARGUMENT

I. Searches Of A Parolee's Residence Need Not Be Based On Reasonable Suspicion When The Parolee Has Consented To Them As A Condition Of Early Release.

As incorporated through the Fourteenth Amendment, the Fourth Amendment imposes the following limitation on State law enforcement: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In placing this limitation on the States' efforts to enforce their criminal laws, the provision does not prevent citizens from consenting on a case-by-case basis to searches of their residence or from consenting globally to all searches of their residence. A contrary view misapprehends the nature of the individual rights created by the Fourth Amendment.

A. States May Condition The Allocation Of Discretionary Government Benefits On The Waiver Of Fourth Amendment Rights.

The Constitution nowhere prohibits States from placing conditions on the receipt of government benefits, and nowhere prohibits government from requiring individuals to waive constitutional rights in order to receive those benefits. Because "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid," *Corbitt v. New Jersey*, 439 U.S. 212, 218 (1978), the Constitution only prohibits the States from directly violating those rights or indirectly doing so by placing improper sanctions on those who exercise them.

By its terms the Fourth Amendment empowers individuals, not society at large. *See Alderman v. United States*, 394 U.S. 165, 174 (1969). It thus gives citizens the right freely to protest government searches as well as the right freely to authorize them. The guiding principle is a libertarian one -- that the individual's consent must be voluntary, not coerced by illicit governmental pressure or coercion. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

Several decisions of the Court define the contours of government procedures that improperly induce the waiver of criminal procedure rights and those that do not, all in the context of consents obtained in return for government benefits. At one extreme lies *Simmons v. United States*, 390 U.S. 377 (1968). After being arrested for trying to rob a local bank, the defendant moved to suppress evidence of the contents of a suitcase found at the scene of the crime. In order to do so under then-existing law, the defendant had to admit ownership of the suitcase. *See Jones v. United States*, 362 U.S. 257 (1960), *over'd in part*, *Rakas v. Illinois*, 439 U.S. 128 (1978), *over'd in part*, *United States v. Salvucci*, 448 U.S. 83, 84 (1980). This requirement created a "dilemma" for the individual because the government intended to use all pertinent suppression testimony against him at trial. 390 U.S. at 391. Reasoning that a "defendant who wishes to establish standing [to invoke his Fourth Amendment rights] must do so at the risk that the words which he utters may later be used to incriminate him," *id.* at 393, the Court found "it intolerable that one constitutional right should have to be surrendered in order to assert another," *id.* at 394. Far from allowing the individual freely to decide when to waive his Fourth (or Fifth) Amendment rights, this tug of war between constitutional rights was anything but voluntary. The government risks coercion, *Simmons* teaches, when it forces the individual to waive one constitutional right in order to assert another.

Other cases stem from governmental conduct that steers clear of this type of coercion. At issue in *Zap v. United States*, 328 U.S. 624 (1946), *vacated on other grounds*, 330 U.S. 800 (1947), was whether the United States could condition the receipt of a contract on consent to future searches. In accepting a contract to conduct test flights, the defendant agreed that the "'accounts and records of the contractor shall be open at all times to the

Government.'" *Id.* at 627 (quoting the contract). At that time, federal law also provided that such contractors had to submit their books to governmental searches. *Id.* at 626-27 & n.2. In accordance with this waiver and with the relevant statutes, the government searched the defendant's offices and seized an incriminating check. While there was some debate over whether the waiver permitted the government to seize the check, all agreed that the defendant had waived any Fourth Amendment expectation of privacy concerning the search. *See id.* at 628 ("he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts"); *id.* at 632 ("I agree that the government had authority, as a result of its contract with the petitioner and the relevant statutes, to inspect the petitioner's books and records") (Frankfurter, J., dissenting, joined by Murphy, J., and Rutledge, J.). In the end the Court upheld the warrantless and suspicionless search.

Wyman v. Jones, 400 U.S. 309 (1971), likewise rejected a claim that the government penalizes Fourth Amendment rights when it conditions acceptance of Aid to Families with Dependent Children on the recipient's submission to warrantless and suspicionless searches. Recognizing the individual's initial option to accept or refuse the benefits, the Court found no coercive action by the government. The beneficiary remained free to choose between forgoing benefits and preserving the privacy of her home, or accepting the benefits and consenting to the searches. *Id.* at 317-18. In contrast to the facts in *Simmons*, the government had not set up one constitutional right against another. It had merely placed a condition on a government benefit, one that it was no less entitled to impose than the individual was entitled to reject.

Outside the context of the Fourth Amendment, the Court regularly permits individuals to waive criminal procedure rights that the United States Constitution gives them in return for certain government benefits. Indeed, much of the criminal law involves instances in which the defendant must make a difficult choice between pursuing one line of factual development over another or advancing one legal right over another. Yet, in case after case, the Court has permitted individuals -- the ultimate beneficiaries of these rights -- to bargain them away for desired government benefits or perceived advantages. *See Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (the prosecutor may present "the defendant with the unpleasant alternative of forgoing trial or facing charges on which he was plainly subject to prosecution"); *Baxter v. Palmigiano*, 425 U.S. 308 (1975) (permitting State to require inmates to choose between (1) waiving their Fifth Amendment privilege to testify at a disciplinary hearing or (2) remaining silent and having an adverse inference drawn from their silence); *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973) (prosecutor may encourage guilty plea even though it requires waiver of jury trial right); *McGautha v. California*, 402 U.S. 183, 213 (1971) (even though "a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the right involved"). *See also South Dakota v. Dole*, 483 U.S. 203, 210 (1987); *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 143-144 (1947). Similar issues exist in *Ohio Adult Parole Authority v. Woodard*, No. 96-1769.

As these cases make clear, the Constitution in general and the Fourth Amendment in particular do not forbid individuals from opting to waive constitutional rights in

return for government benefits. Only when the government "'benefit to be gained is that afforded by another provision of the Bill of Rights," as it was in *Simmons*, 390 U.S. at 394, or when the government pressure rises to the level of coercion, does a Fourth Amendment violation occur.

B. Pennsylvania Acted Well Within These Requirements In Conditioning Mr. Scott's Parole On Consent To Future Searches Of His Residence By Parole Officers.

Pennsylvania complied with these requirements in full. The State's discovery of evidence of a parole violation during a suspicionless search of Mr. Scott's residence therefore should be admissible at his parole revocation hearing.

1. The Nature Of The Lower Court Decision.

On April 2, 1982, Mr. Scott received a 10 to 20 year prison term for third degree murder. After serving 10 years of his term, the Pennsylvania Department of Corrections released him on parole subject to several enumerated conditions. Among other things, he signed a document entitled "Conditions Governing Parole/Reparole," which provided in part:

> I expressly consent to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any items, in [sic] the possession of which constitutes a violation

> of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.

Pet. App. 2a; *id.* at 30a n.3.

Despite the clear language of the consent form and despite Mr. Scott's voluntary signature to it, the Pennsylvania Supreme Court held that the form did not allow parole officials to conduct a suspicionless search of his residence. Relying on one of its earlier decisions, the court reasoned as follows:

> "[T]he parolee's signing of a parole agreement giving his parole officer permission to conduct a warrantless search does not mean either that the parole officer can conduct a search at any time and for any reason or that the parolee relinquishes his Fourth Amendment right to be free from unreasonable searches. Rather, the parolee's signature acts as acknowledgement that the parole officer has a right to conduct reasonable searches of his residence listed on the parole agreement without a warrant. . . . [A] search will be deemed reasonable if the totality of the evidence demonstrates: (1) that the parole officer had a reasonable suspicion that the parolee had committed a parole violation, and (2) that the search was reasonably related to the parole officer's duty."

Pet. App. 9a-10a (quoting *Commonwealth v. Williams*, 692 A.2d 1031, 1036 (1997)).

2. No Independent And Adequate State Ground Exists.

Before addressing the merits of this analysis, it bears acknowledging a potential independent and adequate State ground. Two plausible readings of this portion of the decision exist. The first is that the court was construing the language of the consent form from the perspective of its drafters -- that as a matter of State law they meant the condition to require only the waiver of warrantless searches, not suspicionless ones. The second looks at the consent form from the perspective of its reader (the parolee) -- that as a matter of Fourth Amendment law the language of the form waived only the right to oppose warrantless searches, not suspicionless ones. The one reflects the meaning of the words to the drafter; the other reflects the meaning of the words to the individual. The former would present an independent and adequate State ground, because the State court retains final authority to construe the meaning of Pennsylvania's legislative and administrative acts. The latter would not, because this Court has final authority to determine when and to what extent an individual has waived rights under the United States Constitution.

Because both readings are plausible and because the Pennsylvania Supreme Court did not provide a clear statement that it was independently relying on State law to make this decision, the default rule applies. Under *Michigan v. Long*, 463 U.S. 1032 (1983), the absence of clear direction means that this component of the decision rests on federal grounds and may be reviewed by the Court. *See also Ohio v. Robinette* 117 S. Ct. 417 (1996).

3. The Lower Court Erred.

Turning to the merits, the lower court misconstrued the Fourth Amendment as well as several pertinent decisions of this Court interpreting it. States are fully permitted to condition early release on a parolee's consent to suspicionless searches for purposes of ferreting out violations of State parole requirements. Because inmates do not have a constitutional right to avoid lawful incarceration, *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), conditioning early release on a waiver of Fourth Amendment rights does not place Mr. Scott in the "intolerable" position in which "one constitutional right should have to be surrendered in order to assert another," *Simmons*, 390 U.S. at 394.

Recognizing the unique status of parolees, the Court has previously acknowledged the permissibility of treating parolees differently from other individuals.

> To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen.
>
> * * *
>
> [W]e find that the State's interests are several. The State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty.

Morrissey, 408 U.S. 471, 478, 483 (1972) (emphasis added). *See also Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987).

Nor on this record did coercion of any kind occur. Just as states have no obligation to forgo full imposition of a lawfully- imposed sentence, offenders in Pennsylvania have no obligation to accept the terms of early release. One national study indicates that up to one third of inmates reject early release in view of the difficult conditions placed on it. J. Petersilia, *When Probation Becomes More Dreaded Than Prison,* Federal Probation, March 1990, 23. Under these circumstances, it cannot tenably be argued that the State has engaged in coercion masquerading as choice. Indeed, the choice the State offered Mr. Scott presents far less pressure than the difficult choices the Court has allowed governments to present to other inmates, criminal suspects and criminal defendants. *See McGautha v. California*, 402 U.S. 183, 213 (1971); *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978); *Chaffin v. Stynchombe*, 412 U.S. 17, 31 (1973).

The Fourth Amendment likewise permits individuals to consent to searches on an instance-by-instance basis as well as with respect to all future searches. As a matter of logic and precedent, nothing in the provision requires individuals to provide their consent one search at a time. The guarantee equally allows retail and wholesale consents to search.

Neither is it appropriate to discount the assortment of reasons why a prisoner would waive such rights. In addition to obtaining early release, prisoners may agree to such a condition because they have no intention (at the time) of committing a parole violation or, better yet, prefer the threat of unannounced searches as an inducement to follow parole guidelines. Many citizens want to comply with the law, and for some it may be as liberating to let the truth be known as

it is to hide the truth in the interest of staying out of jail. Yet such moral pressures, all attributable to the individual and not the State, do not show the kind of governmental coercion that undermines a Fourth Amendment waiver. *See Schneckloth, supra*; *cf. Colorado v. Connelly*, 479 U.S. 157, 170 (1986) ("the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion'") (quoting *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)); *United States v. Washington*, 431 U.S. 181, 187 (1977); *Minnick v. Mississippi*, 498 U.S. 146, 167 (1990) (Scalia, J., dissenting).

A decision making such time-respected choices unconstitutional, moreover, would threaten the basic underpinnings, and hence the continued viability, of probation and parole. Restrictive conditions are an essential tool for making sure that probationers and parolees hew to the path of rehabilitation. What States will be willing to shorten criminal sentences without being able to provide the utmost assurance to their citizens that the parolees' rehabilitative progress is being closely monitored? Indeed, without such conditions, it is no exaggeration to conclude that the availability of those programs would be severely restricted.

Nor can there be any doubt that Mr. Scott consented to the search conducted here. He agreed as a condition of early release that parole officers could conduct a search of his residence without a warrant. The requirement of a warrant has long been deemed, and therefore fairly perceived, as the essence of the privacy right established by the Fourth Amendment. *See Steagald v. United States*, 451 U.S. 204, 214 n.7 (1981) (citing *Payton v. New York*, 445 U.S. 573, 602-03 (1980)). By waiving the right to insist on a warrant before officers searched his residence, Pet. App.

2a, Mr. Scott clearly waived the right to insist on any level of suspicion (customarily defined by the existence of a warrant) before officers searched his residence.

The State's authority to require consent to such searches, it bears adding, does not make parolees complete strangers to the protections offered by the Fourth Amendment. The consent requirement, all agree, must itself still be reasonable. *See Griffin, supra*; *O'Lone v. Shabazz*, 482 U.S. 342, 349 (prison regulations allegedly infringing constitutional rights are themselves constitutional so long as they are "reasonably related to legitimate penological interests") (internal quotation omitted). Thus, in spite of the consent form filed by Mr. Scott, the parole officers' search had to be reasonable in nature and duration, as well as connected to legitimate parole considerations, even though the search itself no longer required reasonable suspicion. Plainly, the State followed these requirements here. For like reasons, it is as appropriate to impose such waivers through consent forms as through State statutes or regulations. *See Griffin, supra*; *Zap, supra*.

A final word deserves consideration. In our view, the harder question in this case is whether Pennsylvania overprotected Mr. Scott's rights, not whether it violated them. Several decisions from the Court suggest that in view of the special needs of State parole programs, Pennsylvania could have engaged in such suspicionless searches even without Mr. Scott's consent. *See Veronia School Dist. 47J v. Alton*, 115 S. Ct. 2386 (1995); *National Treasury Employee Union v. Von Raab*, 489 U.S. 656, 674-75 (1989); *Skinner v. Railway Labor Executive Assoc.*, 489 U.S. 602, 619 (1989); *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967). Just as the Court has permitted random searches of prison cells, *see Hudson v. Palmer*, 468 U.S. 517, 529 (1984), so too it has permitted such seaches in a wide range

of administrative settings that present special safety considerations to the government and diminished privacy expectations for the individual. Under these cases, it would seem to follow that a parolee, no less than those "who choose to participate in a closely regulated industry," "have reason to expect intrusions upon normal rights and privileges, including privacy." *Veronia*, 115 S. Ct. at 2393. Here, however, Pennsylvania went further. It sought -- and obtained -- consent to search. The question whether the State had to do so need not be addressed.

II. The Exclusionary Rule Does Not Apply To -- And Should Not Be Expanded To Apply To -- Probation and Parole Revocation Proceedings.

Even if the Court concludes that Pennsylvania violated Mr. Scott's Fourth Amendment rights, it still should reverse the lower court decision. The Pennsylvania Supreme Court erred in extending the exclusionary rule to this setting.

A. The Court Has Applied The Exclusionary Rule Only In The Context Of The Criminal Trial And Direct Review.

The language of the Fourth Amendment does not compel the exclusion of evidence obtained in violation of its requirements, and thus "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *United States v. Leon*, 468 U.S. 897, 906 (1980) (citing *Stone v. Powell*, 428 U.S. 465, 486 (1976)). The exclusionary rule, instead, "was a judicially created means of effectuating the rights secured by the Fourth Amendment" in discrete settings, *Powell*, 428 U.S. at 482, a rule that did not apply to the federal

government until 1914, *see Weeks v. United States*, 232 U.S. 383 (1914), and one that did not apply to the States until 1961, *see Mapp v. Ohio*, 367 U.S. 643 (1961).

"The primary justification for the exclusionary rule" is "deterrence" -- to discourage "police conduct that violates Fourth Amendment rights." *Powell*, 428 U.S. at 486. *See Calandra*, 414 U.S. at 348 ("the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect"). Because any "[r]eparation comes too late" to protect the invasion of privacy that accompanies a Fourth Amendment violation, *Linkletter v. Walker*, 381 U.S. 618, 637 (1965), the exclusionary rule is not a "personal constitutional right . . . calculated to redress" the injury to the victim of the invalid search or seizure, *Powell*, 428 U.S. at 486. Rather, it creates a disincentive to violate the provision by suppressing evidence obtained in disregard of its terms.

At the same time, the Court has recognized that the "policies behind the exclusionary rule" are relative, "not absolute." *Powell*, 428 U.S. at 488. The benefits of deterrence, the Court has made clear, do not invariably outweigh "the public interest in determination of truth at trial" or the costs of suppressing pertinent evidence of administrative misconduct. Accordingly, "application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348. Thus far, the Court has generally restricted application of the exclusionary rule to the criminal trial and direct review. *See Mapp v. Ohio*. It has declined to extend the rule to grand jury proceedings, *see United States v. Calandra*, 414 U.S. 338, to the impeachment of criminal defendants, *Walder v. United States*, 347 U.S. 62 (1954), to administrative proceedings, *see Immigration and Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032

(1984), to civil proceedings commenced by another sovereign, *see United States v. Janis*, 428 U.S. 433 (1976), and to federal habeas review of State-court criminal convictions, *see Stone v. Powell*, 428 U.S. 465 (1976).

B. The Exclusionary Rule Should Not Be Extended To Parole Revocation Proceedings.

Conceived in a spirit of judicial "pragmati[sm]," *Powell* 428 U.S. at 488, the exclusionary rule thus has been extended only to those areas where the benefits of deterrence outweigh the considerable costs of suppressing relevant evidence. Yet such cost-benefit balancing, simply put, does not favor extending the rule to parole revocation proceedings.

First, the criminal trials covered by *Mapp* differ in kind from the parole revocation proceedings covered here. Unlike criminal trials, revocation hearings do not focus on the guilt or innocence of an individual concerning a past event. They consider how to rehabilitate offenders and how to ensure that the public does not suffer from premature releases of still-dangerous prisoners. *Gagnon v. Scarpelli*, 416 U.S. 778, 783-791 (1973). Indeed, most proceedings do not even result in reincarceration, confirming the non-punitive nature of the hearing. Bureau of Justice Statistics, U.S. Dept. of Justice, T. Bonczar, *Special Report Characteristics on Adults on Probation 1995*, Special Report, Dec. 1997, at 10 (noting that incarceration occurs in only 29% of revocation proceedings); National Institute of Corrections, U.S. Dept. of Justice, *Status Report on Parole, 1995: Results of An NIC Survey* (Nov. 1995) at 8-9 and table 16 (outlining alternatives to reincarceration).

Nor do revocation proceedings have the same adversarial nature that criminal trials do. The unique nature

of the issues involved -- rehabilitation and public safety -- require a freer flow of information and more flexible procedures than a criminal trial allows. *Gagnon*, 411 U.S. at 782-790. As the Court has observed in concluding that information may be considered in revocation proceedings that is not admissible in criminal trials:

> We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry, the process should be flexible enough to consider evidence . . . that would not be admissible in any adversary criminal trial.

Morrissey v. Brewer, 408 U.S. 471, 489 (1972); *see also Lopez-Mendoza*, 468 U.S. at 1048-1049. In the end, little symmetry exists between a criminal trial's focus on the guilt or innocence of an individual and a revocation hearing's focus on public safety, rehabilitation and the prevention of future harm. The revocation hearing more closely parallels administrative hearings, to which the exclusionary rule does not apply, *see Lopez-Mendoza*, 468 U.S. at 1038-39, than criminal trials, to which the rule does apply, *see Mapp*.

Second, the policy of deterring future Fourth Amendment violations, the "primary justification" for the exclusionary rule, *Stone v. Powell*, 428 U.S. at 486, does not advance the lower court's decision. Neither respondent nor the lower courts have identified any pattern and practice of violations of parolees' Fourth Amendment rights, or for that matter any empirical evidence establishing that application of the exclusionary rule in this setting would in fact deter Fourth Amendment violations.

Nor is it likely that such a deterrent effect could be shown. Police officers and parole officials operate under very different sets of institutional incentives. The police try to obtain criminal convictions. Parole officials try to move rehabilitated convicts out of overcrowded (and costly) prisons and back into society. The former succeeds by winning criminal trials; the latter succeeds by rehabilitating convicts and getting them out of jail. *See Morrissey*, 408 U.S. at 483-484; R. Prus & J. Stratton, *Parole Revocation Decisionmaking: Private Typings and Official Designations*, Federal Probation, March 1976, 48, 50-51.

What is more, State parole officials already have strong incentives for respecting the guarantees of the Fourth Amendment. All State officials, of course, have a duty to obey the Constitution, one that this Court's precedents presume they will follow. *See Agostini v. Felton*, 117 S. Ct. 1997, 2010-2011 (1997). Some States, moreover, already have exclusionary rules applicable to revocation proceedings under State law, *see, e.g., State v. Marquart*, 945 P.2d 1027 (N.M. App. 1997); *State ex rel. Juvenile Dept. of Multnomah County v. Rogers*, 836 P.2d 127 (Or. 1992); *State v. Lapman*, 724 P.2d 1092 (Wash. App. 1986), which themselves limit the need for federalizing this area, *Janis*, 428 U.S. at 445 n.14. Empirical studies also suggest that corrections officials respond to findings of improper conduct by changing offending policies and practices. C. McCoy: *The Impact of Section 1983 Litigation on Policy Making In Corrections*, Federal Probation, Dec. 1981, 17.

Improper revocations also would undermine the institutional interests of probation and parole agencies. On the most fundamental level, unwarranted revocations would impede one of the core administrative functions of these agencies, alleviating prison and jail overcrowding. The major professional organizations and accrediting agencies

governing the field also require that agencies strive to observe offenders' rights. American Correctional Association: *Standards for Adult Probation and Parole Field Services*, Standard 2-3160 (2d Ed. 1981) ("Searches should comply with legal requirements"); American Probation and Parole Association: *Code of Ethics* at ¶¶ 2, 3. Abuse of the revocation process would violate those standards, risking the agencies' accreditation and professional standing.

Individual parole officers themselves have strong personal incentives to avoid wrongful revocations. Most officers view revocations as an indication that they have failed and most recognize that initiating too many revocation proceedings may adversely affect their professional standing. R. Prus & J. Stratton: *supra* at 50-51. Similarly, probation and parole officers have become increasingly concerned about the potential for individual tort liability. Prus & Stratton, *supra* at 51.

Ultimately, the Court has refused to presume that expansion of the rule beyond the criminal trial setting will deter misconduct and has required "convincing indication[s]" that any proposed expansion will effectively supplement existing deterrents. *Lopez-Mendoza*, 468 U.S. at 1046. Instead, it has looked for proof to justify any proposed expansion and has characterized the rule as a "grudgingly taken medicant" of which "no more should be swallowed than is needed." *Janis*, 428 U.S. at 454, n.29. Respondent has not shown that any such strong medicine is needed here.

Third, extension of the rule will hamstring the effective operation of parole programs and cause a host of "secondary costs that flow from the less accurate or more cumbersome adjudication" following application of the rule. *Lopez-Mendoza*, 468 U.S. at 1041. "Applying the

exclusionary rule in proceedings that are intended not to punish past transgressions but to prevent their continuances or renewal would require [decisionmakers] to close their eyes to ongoing violations of the law." *Id.* at 1046. Extension of the rule would deprive officials of relevant information necessary to achieve the bookend objectives of a responsible parole system -- rehabilitation and protection of the public.

C. Nor Should The Exclusionary Rule Apply When The Officer Knows That The Resident Is A Parolee.

The lower court agreed with much of the above analysis. Yet it still concluded that the exclusionary rule should apply under some circumstances, namely whenever the investigating officer knows or has reason to know the status of the parolee at the time of the search. In the lower court's view, when the investigator knows the status of the parolee and "there is no reasonable suspicion of a parole violation, there is a need to apply the exclusionary rule to the revocation process since otherwise there is nothing to deter a parole agent from conducting an illegal search or engaging in other illegal activity to obtain evidence." Pet. App. 15a. This is wrong on several fronts.

The continued existence of the exclusionary rule for criminal proceedings already acts as a strong deterrent against unconstitutional searches of parolees, whether the police know their status or not. An officer that suspects criminal activity is afoot is as apt to be interested in getting an arrest (and conviction) as a parole revocation. Only the oddest of fact patterns would tempt an officer to sacrifice a potential criminal conviction in order to obtain a parole revocation.

For like reasons, a knowledge-based approach does not in fact offer any additional deterrence against unauthorized searches. A police officer who conducts an unauthorized search violates the Constitution in one of two ways: Either the violation was inadvertent (*i.e.*, negligent), or it was intentional. When negligence is the source, no extra deterrence follows from a knowledge-based limitation. The whole point of such a limitation is to prevent intentional, not negligent, unconstitutional searches -- in other words, to prevent just those searches that occur because the officers know the individuals to be parolees and think they can get away with the violations because the evidence may be used in a parole revocation proceeding. A knowledge-based limitation simply will not deter inadvertent violations; it just will exclude pertinent evidence.

No doubt, the same cannot be said for intentional violations. A knowledge-based limitation might well deter such transgressions, but it still offers no more deterrence than already exists. When police officers intentionally violate a citizen's constitutional rights, the exclusionary rule is the least of their worries. Such conduct exposes officials to individual-liability claims, internal discipline and worse. These risks to the officer's welfare provide all the deterrence anyone needs. A contrary view, moreover, posits a law enforcement officer more concerned about the potential exclusion of evidence than the potential for a money-damages action and self-advancement. While it might be said that such concern for the public welfare remains the hallmark of being a police officer, it hardly applies to the malevolent parole officer that the lower court conjured in addressing this issue. That court's contrary conclusion should be reversed.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to reverse the decision below.

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In The
Supreme Court of the United States

October Term, 1997

PENNSYLVANIA BOARD OF PROBATION & PAROLE,
Petitioner,

vs.

KEITH M. SCOTT
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

BRIEF AMICI CURIAE
OF
AMERICANS FOR
EFFECTIVE LAW ENFORCEMENT, INC.
JOINED BY
THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC., AND
THE NATIONAL SHERIFFS' ASSOCIATION
IN SUPPORT OF
THE PETITIONER.

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ON WRIT OF CERTIORARI TO THE
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BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF THE PETITIONER.

This brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of

consent have been filed with the Clerk of this Court, as required by the Rules.[1]

INTEREST OF *AMICI CURIAE*

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the law enforcement effort more effective, in a constitutional manner. It seeks to improve the operation of the law enforcement and corrections functions to protect our citizens in their life, liberties, and property, within the framework of the various state and federal constitutions.

AELE has previously appeared as *amicus curiae* over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 16,000 members in 96 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital law enforcement services more effective, while at the same time protecting the rights of all our citizens.

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[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: This brief was authored for the *amici* by James P. Manak, Esq., counsel of record, and Wayne W. Schmidt, Esq., Executive Director, Americans for Effective Law Enforcement, Inc. No other persons authored this brief. Americans for Effective Law Enforcement, Inc., made the complete monetary contribution to the preparation and submission of this brief, without financial support from any other source, directly or indirectly.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the nation's sheriffs, jail, and corrections administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

Amici are national professional associations representing the interests of law enforcement at the national, state, and local levels. Our members include: (1) law enforcement officers, law enforcement administrators, and correctional administrators who are charged with the responsibility of executing and overseeing the process of arrest and searches within the bounds of the law; and (2) legal advisors who are called upon to advise law enforcement officers, administrators, and correctional administrators in connection with such matters, including the formulation and implementation of policy on the conduct of arrests and searches of probationers and parolees.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel—we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

STATEMENT OF THE CASE

The court below, *Scott v. Pennsylvania Board of Probation & Parole*, 698 A.2d 32 (Pa. 1997), on the basis of prior state precedent, *Commonwealth v. Williams*, 692 A.2d 1031 (Pa. 1997) (a case decided on the basis of the Fourth Amendment), ruled that a parolee who has consented, as a condition of release, to warrantless searches of his person and residence by agents of a parole board nevertheless retains a

limited expectation of privacy against searches conducted without reasonable suspicion that the parolee has committed a parole violation. It held that evidence seized by a police or parole officer in a search that is unreasonable under the *Williams* rule is subject to exclusion if the officer was, or had reason to be, aware of the parolee's status.

SUMMARY OF ARGUMENT

Amici take the position that the Fourth Amendment exclusionary rule does not apply to parole revocation proceedings and that a search of a parolee's residence need not be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole.

It is our belief that the rule of the court below is not constitutionally required under established Fourth Amendment precedent pertaining to consent searches. On policy grounds it does serious damage to the societal interest in the effective administration of probation and parole systems, and is not in the best interest of those probationers and parolees who are honestly interested in their personal rehabilitation and return to society as full and productive members.

ARGUMENT

A. EFFECTIVE REHABILITATION OF EX-OFFENDERS WILL BE HAMPERED BY THE RULE OF THE COURT BELOW.

B. THE EXCLUSIONARY RULE IS NOT APPLICABLE IN PROBATION AND PAROLE REVOCATION HEARINGS.

A. Effective rehabilitation of exoffenders cannot be accomplished by infrequent contact between parole officers and parolees. The parole authority must impose strict rules and retain the ability to enforce those rules in an unfettered manner.

- The state has a dual obligation to (a) make every reasonable effort to rehabilitate exoffenders, and (b) to promote public safety in the communities where probationers and parolees are placed or allowed to live.
- To maintain successful rehabilitation programs, states must monitor parolees to insure that they do not abuse drugs or possess weapons. Because of caseload concerns, parole officers must supplement their infrequent contacts with parolees by enforcing strict rules.
- Because exoffenders who are not fully rehabilitated remain immature and untrustworthy, they must remain continually aware of the fact they can be subjected to unannounced and *standardless* searches. Random and standardless searches should be allowed on proof which is less than a reasonable suspicion of misconduct. Certainly, where a probationer or parolee has freely and voluntarily agreed to conditions permitting standardless searches of his person and property, the court's jurisprudence on consent searches should control. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Ohio v. Robinette*, 117 S. Ct. 417 (1996).

The Fourth Amendment proscribes searches conducted outside the judicial process, but this Court has recognized

exceptions when special needs, beyond the normal need for law enforcement, make the probable cause or reasonable suspicion requirement impractical or unnecessary. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868 (1987) (search of probationer's home); *New York v. Burger*, 482 U.S. 691 (1987) (search of premises of highly regulated business); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (work-related search of employee's desk); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (search of student's property by school officials); *Hudson v. Palmer*, 468 U.S. 517 (1984) (search of prisoner's cell).

As noted by this Court in *New Jersey v. T.L.O.*, *supra* at 342, n.8, a case involving suspicionless, administrative searches of students, "where the privacy interests indicated by a search are minimal and other safeguards are available to assure the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field,'" exceptions to the requirement of individualized suspicion do not violate the Fourth Amendment. *See also, People v. Parker*, 284 Ill. App. 3d 860, 672 N.E.2d 813, 816, 219 Ill. Dec. 960 (Ill. App. 1 Dist. 1996) ("The Supreme Court has upheld suspicionless, administrative searches which were conducted as part of a general regulatory scheme to ensure public safety, not as a criminal investigation to secure evidence of crime. See *Vernonia School District 47J v. Acton*, ___ U.S. ___, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995) (drug testing of student athletes); *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976) (automobile checkpoints looking for illegal immigrants and contraband); *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed 2d 412 (1990) (checkpoints to snare drunk drivers).").

B. The exclusionary rule should not be applied to parole revocation hearings because of conflicting judicial policies. The rule's stated purpose of discouraging standardless searches must give way to the greater purpose of encouraging full

rehabilitation. Extending the exclusionary rule to revocation hearings conflicts with the more important purpose of encouraging rehabilitation.

- It is vital that any drugs or weapons found during these searches be admissible in administrative parole revocation hearings. Parolees must remain aware that if they are found abusing drugs or possessing weapons, evidence or contraband seized from their homes, cars, or persons can and will be used to revoke their conditional release from prison. Some parolees will not "play by the rules" if they know there are no penalties if they are caught.
- The recognition of *any* standard requirement, *no matter how minimal*, impedes the more important goal: the effective rehabilitation of exoffenders. The state has an obligation to help exoffenders become useful, productive and law-abiding members of society. That is the very purpose of "corrections."

Moreover, the state has an overwhelming interest in being able to return a parolee to imprisonment without the burden of meeting the requirements of the exclusionary rule if the parolee has failed to abide by the conditions of parole. *Morrissey v. Brewer*, 408 U.S. 471 (1972). This Court has recognized that the decision to revoke probation or parole is an administrative one; it should be a flexible and informal process that "does not require the full panoply of procedural safeguards associated with a criminal trial." *Black v. Romano*, 471 U.S. 606, 613 (1985).

By injecting Fourth Amendment requirements into what should be a purely administrative decision, the court below has, in effect, converted what should be an informal information-gathering proceeding into an adversarial trial. Instead of what should be a "predictive and discretionary" process, the court below has converted the role of the administrative process into one "more akin to that of a judge at trial, and less attuned to the rehabilitative needs of the individual probationer or parolee." *Gagnon v. Scarpelli*, 411 U.S. 778, 787-88 (1973).

Finally, *amici* note from our particular vantage point that the decision of the court below will, in effect, transform probation and parole agents into law enforcement officers (police), an effect neither desired by nor desirable for the correctional system. These public officials serve the societal interests of rehabilitation of exoffenders and their return to productive membership in mainstream community life.

Application of the exclusionary rule to their activities misconceives their role in the justice system and is, in plain words, bad policy and opposite to the trend away from linking the exclusionary rule to administrative proceedings, *see, e.g., People v. Arron C.*, 1997 WL 763209, 1997 Cal. App. LEXIS 1033 (Cal. App. 1 Dist., Dec. 11, 1997) (No. A076469) (declining to apply the exclusionary rule to a search conducted by probation officers: "[p]robation officers are not 'adjuncts to the law enforcement team,'" quoting *Arizona v. Evans*, 514 U.S. 1, 15 (1995) in reference to court clerks).

CONCLUSION

Amici urge this Court to reverse the decision of the court below on the basis of the precedents of this Court and sound judicial policy.

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PENNSYLVANIA BOARD OF
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Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

(1) Must a search of a parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of parole?

(2) Whether the exclusionary rule applies to parole revocation proceedings?

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STATEMENT OF *AMICI* INTEREST

Ohio and 32 other States write to urge the Court to reverse the decision below and to explain why this case matters not just to Pennsylvania but to her sister States as well.

At stake are two principles of law: (1) whether law enforcement officers need reasonable suspicion to search the residence of a parolee or probationer who has consented to future searches as a condition of early release, and (2) whether in the alternative the exclusionary rule should be extended to parole revocation proceedings. On both points, the States have significant reliance interests. They have long conditioned the early release of prisoners on the waiver of Fourth Amendment rights, and few (if any) State courts have customarily extended the exclusionary rule to parole revocation proceedings.

The States have a considerable interest in the efficient operation of their probation and parole systems. The availability of parole provides a useful tool for rehabilitating certain offenders and for preserving scarce prison space for other offenders who for one reason or another continue to pose a danger to the public. All 50 States and the federal government have some form of early release program. And approximately three-quarters of all adult offenders participate in some form of conditional release while serving a criminal sentence. J. Gobert & N. Cohen: *The Law of Probation and Parole*, § 1.01 (1983).

Parole programs also present unique administrative challenges. Officials must make inherently difficult decisions, balancing the prospect that the rehabilitation of offenders will be furthered by supervised release against the risk that they could exploit their freedom to break the law again. *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 422 U.S. 1, 8-9 (1979). *See also*

Griffin v. Wisconsin, 483 U.S. 868, 873-875 (1987); *Morrisey v. Brewer*, 408 U.S. 471, 483-484 (1972).

Making these decisions more difficult still is the frequency with which they must be made. The number of probationers and parolees has increased by more than two-thirds since 1987, from 1,798,390 to 2,999,287. As a result, the average case load of probation officers has risen from 111 to 301 offenders, a 179% increase, while the average case load of parole officers has risen from 94 to 164, a 74% growth. Criminal Justice Institute, Inc., *The Corrections Yearbook* (1988), 68, 69, 72, 73; *The Corrections Yearbook* (1997), 140-141,148.

These same officials also have been asked to supervise an increasingly difficult group of criminals. Due in large part to increasingly overcrowded prisons, the percentage of felons in early-release programs has increased from approximately 10% in the 1950's to almost 60% today. C. Lindner & R. Bonn, *Probation Officer Victimization and Field Work Practice: Results of a National Study*, Federal Probation, June 1996, 16; Bureau of Justice Statistics, U.S. Dep't of Justice, T. Bonczar, *Characteristics of Adults on Probation*, Dec. 1997, 1, 3. Plus, more and more offenders with drug abuse, mental health needs and other problems are being given early release, many of whom require significant resources to supervise. Lindner & Bonn, *supra*; M. Bork, *Five Year Review of United States Probation Data, 1990-1994*, Federal Probation, December 1995, 27, 29; Bonczar, *supra* at 2; Lindner, *supra* at 17; J. Denzlinger & D. Miller, *The Federal Probation Officer: Life Before and After Guideline Sentencing*, Federal Probation, Dec. 1991, 49.

Probation and parole agencies have tried to meet these challenges in a variety of ways. As an initial matter, they have increased standards of professionalism. Accrediting

requirements and codes of ethics have been established at the same time that educational prerequisites and in-service training have been increased. R. Lawrence, *Professionals or Judicial Civil Servants*, Federal Probation, Sept. 1994, 14; American Correctional Association, *Standards for Adult Probation and Parole Field Services*, (2d ed, 1981, supplemented 1996). For example, a four-year degree is now a minimum requirement for probation and parole officers and many agencies require a Master's Degree. R. Lawrence, *supra*, at 14. States also require an average of 234 hours of specialized training before a new officer can undertake his or her duties and an average of 41 hours of continuing education each year thereafter. Criminal Justice Institute, *The Corrections Yearbook 1997*, 177. These standards have become so well established as to be a requirement for accreditation. *Standards for Adult Probation*, Standards 2-3041, 2-3060, 2-3060-1, 2-3065, 2-3069, 2-3070.

Notwithstanding these innovations, the most important tools for meeting these diverse challenges continue to be active oversight of offenders' adjustment to release. Only by following a convict's activities outside the prison can the caseworker ensure that the premise of early release -- that the offender no longer poses a threat to public safety -- remains warranted. As one leading commentator on the subject has explained:

> To fulfill these functions, the parole or probation officer needs considerable investigative leeway. While some information can be garnered from discussions with the offender and the offender's friends, associates, employees, and relatives, other data regarding the person's home life and behavior may not be available from these sources. Investigation

> of the offender's home, possessions, and body may also be required. In such situations, parole and probation officers believe that they need to be able to make unannounced home visits and searches. Often this authority is expressly written into the conditions of release. Even absent a search condition, the nature of the caseworker-offender relationship, and the reduced expectation of privacy which comes from being a probationer or parolee, may implicitly permit such searches. In any event, many parole and probation officers think these searches are necessary and often exercise their prerogative to conduct searches.

J. Gobert & N. Cohen, *supra* at § 8.02 (emphasis added, footnotes omitted).

Authority to conduct such searches, in the aftermath of consent given to make them as a condition of early release, has long been allowed under lower court decisions construing the Fourth Amendment. And, to our knowledge, most States follow the practice of requiring consents to search before offering early release. *See* S. Kneafsey, *The Fourth Amendment Rights of Probationers: What Remains After Waiving Their Right To Be Free From Unreasonable Searches and Seizures?* 35 Santa Clara. L. Rev. 1237, 1249 (1995); *see also Owens v. Kelly* 681 F.2d 1362, 1366-1369 (11th Cir. 1982) (collecting cases).

SUMMARY OF ARGUMENT

In suppressing evidence of a parole violation committed by Mr. Scott, the Pennsylvania Supreme Court erred in two respects. It found that the parole officers

needed reasonable suspicion to search his residence when Mr. Scott had previously consented to such searches as a condition of obtaining a discretionary early release. And it compounded the error by extending the exclusionary rule to the administrative setting of parole (and presumably probation) revocation proceedings.

1. The lower court's first conclusion does not rest on an independent and adequate State ground. While some ambiguity exists concerning the State or federal root of the Pennsylvania Supreme Court's analysis -- did the lower court mean to construe the effect of the waiver as a matter of State law or Fourth Amendment law? -- the court nowhere provides the requisite clear statement needed to insulate this component of the decision from federal review. *See Michigan v. Long*, 463 U.S. 1032 (1983).

The States do not violate -- indeed, they respect -- the Fourth Amendment's prohibition against "unreasonable searches and seizures" when they obtain consent to search an individual's residence. They may obtain such consents on a case-by-case basis, *see Schneckloth v. Bustamonte*, 412 U.S. 218 (1972); and they may do so globally, *see Wyman v. James*, 400 U.S. 309 (1971), *Zap v. United States*, 328 U.S. 624 (1946), *vacated on other grounds*, 330 U.S. 800 (1947). And, above all, they may do so in return for extending a discretionary governmental benefit to which future searches are reasonably related. *See, e.g., Wyman*; *Zap*. So long as government does not put the individual in a position in which "one constitutional right should have to be surrendered in order to assert another," *Simmons v. United States*, 390 U.S. 377 (1968), so long in other words as the government does not bend the will of the individual, *see Schneckloth*, it may permissibly extend discretionary benefits on a conditional basis.

Pennsylvania acted well within these restrictions here. At the time Mr Scott signed the consent form to future searches of his residence by parole officials, he was being extended an opportunity to leave a setting in which random searches are already permitted, waiver or not. *See Hudson v. Palmer*, 468 U.S. 517, 529 (1984). Plainly, the consent requirement was reasonable, and the bargain legitimate. The whole point of carefully monitoring those who have not yet served out the full term of their sentence is to ensure that the premise of early release -- that the offender has proceeded far enough down the path of rehabilitation as no longer to pose a threat to public safety -- remains warranted. The State merely placed an eminently sensible restriction on the terms of Mr. Scott's release, one that it was no less entitled to impose than he was entitled to reject. If there is doubt here, it is whether Pennsylvania overprotected Mr. Scott's rights, not whether it violated them. Under a series of decisions that arise in administrative settings that like this one implicate a host of public safety concerns, it would seem that Pennsylvania had every right to engage in this type of limited search of the residence of their parolees with or without their consent. *See Veronia School Dist. 47J v. Alton*, 115 S. Ct. 2386 (1995); *National Treasury Employee Union v. Von Raab*, 489 U.S. 656 (1989); *Camara v. Municipal Court*, 387 U.S. 523 (1967). Yet the Court need not reach that broader issue since Pennsylvania in fact obtained Mr. Scott's consent.

2. Even if the Pennsylvania Supreme Court correctly found a Fourth Amendment violation, it erred in extending the exclusionary rule to the administrative setting of a parole revocation hearing. The "pragmatic" explanation for imposing an exclusionary rule in criminal trials, primarily the goal of deterrence, *Stone v. Powell*, 428 U.S. 465, 488 (1976), does not carry over to the rehabilitative and public-safety considerations that dominate a State's complex

determination whether to allow a law breaker to leave prison early. The Court has never extended the exclusionary rule beyond the criminal trial (and direct appeal), and in point of fact has rejected requests to extend the rule to grand jury proceedings, the impeachment of criminal defendants, administrative proceedings, civil proceedings commenced by another sovereign, and habeas review of State-court criminal convictions.

The rule is a "grudgingly taken medicant" of which "no more should be swallowed than is needed." *United States v. Janis*, 428 U.S. 433, 454 n.29. And no such medicine is needed here. The exclusion of evidence used to show whether the hopeful assumptions about Mr. Scott's rehabilitation remain true (they do not, it turns out) have no meaningful parallel to the question whether wrongfully-obtained evidence may be used to convict an individual in the first instance. It is one thing to use such evidence to overcome the presumption of a citizen's innocence. Yet it is quite another to use it to determine whether the presumptive public-safety risk of allowing a convict's early release continues to be worth taking.

ARGUMENT

I. Searches Of A Parolee's Residence Need Not Be Based On Reasonable Suspicion When The Parolee Has Consented To Them As A Condition Of Early Release.

As incorporated through the Fourteenth Amendment, the Fourth Amendment imposes the following limitation on State law enforcement: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In placing this limitation on the States' efforts to enforce their criminal laws, the provision does not prevent citizens from consenting on a case-by-case basis to searches of their residence or from consenting globally to all searches of their residence. A contrary view misapprehends the nature of the individual rights created by the Fourth Amendment.

A. States May Condition The Allocation Of Discretionary Government Benefits On The Waiver Of Fourth Amendment Rights.

The Constitution nowhere prohibits States from placing conditions on the receipt of government benefits, and nowhere prohibits government from requiring individuals to waive constitutional rights in order to receive those benefits. Because "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid," *Corbitt v. New Jersey*, 439 U.S. 212, 218 (1978), the Constitution only prohibits the States from directly violating those rights or indirectly doing so by placing improper sanctions on those who exercise them.

By its terms the Fourth Amendment empowers individuals, not society at large. *See Alderman v. United States*, 394 U.S. 165, 174 (1969). It thus gives citizens the right freely to protest government searches as well as the right freely to authorize them. The guiding principle is a libertarian one -- that the individual's consent must be voluntary, not coerced by illicit governmental pressure or coercion. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

Several decisions of the Court define the contours of government procedures that improperly induce the waiver of criminal procedure rights and those that do not, all in the context of consents obtained in return for government benefits. At one extreme lies *Simmons v. United States*, 390 U.S. 377 (1968). After being arrested for trying to rob a local bank, the defendant moved to suppress evidence of the contents of a suitcase found at the scene of the crime. In order to do so under then-existing law, the defendant had to admit ownership of the suitcase. *See Jones v. United States*, 362 U.S. 257 (1960), *over'd in part*, *Rakas v. Illinois*, 439 U.S. 128 (1978), *over'd in part*, *United States v. Salvucci*, 448 U.S. 83, 84 (1980). This requirement created a "dilemma" for the individual because the government intended to use all pertinent suppression testimony against him at trial. 390 U.S. at 391. Reasoning that a "defendant who wishes to establish standing [to invoke his Fourth Amendment rights] must do so at the risk that the words which he utters may later be used to incriminate him," *id.* at 393, the Court found "it intolerable that one constitutional right should have to be surrendered in order to assert another," *id.* at 394. Far from allowing the individual freely to decide when to waive his Fourth (or Fifth) Amendment rights, this tug of war between constitutional rights was anything but voluntary. The government risks coercion, *Simmons* teaches, when it forces the individual to waive one constitutional right in order to assert another.

Other cases stem from governmental conduct that steers clear of this type of coercion. At issue in *Zap v. United States*, 328 U.S. 624 (1946), *vacated on other grounds*, 330 U.S. 800 (1947), was whether the United States could condition the receipt of a contract on consent to future searches. In accepting a contract to conduct test flights, the defendant agreed that the "'accounts and records of the contractor shall be open at all times to the

Government.'" *Id.* at 627 (quoting the contract). At that time, federal law also provided that such contractors had to submit their books to governmental searches. *Id.* at 626-27 & n.2. In accordance with this waiver and with the relevant statutes, the government searched the defendant's offices and seized an incriminating check. While there was some debate over whether the waiver permitted the government to seize the check, all agreed that the defendant had waived any Fourth Amendment expectation of privacy concerning the search. *See id.* at 628 ("he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts"); *id.* at 632 ("I agree that the government had authority, as a result of its contract with the petitioner and the relevant statutes, to inspect the petitioner's books and records") (Frankfurter, J., dissenting, joined by Murphy, J., and Rutledge, J.). In the end the Court upheld the warrantless and suspicionless search.

Wyman v. Jones, 400 U.S. 309 (1971), likewise rejected a claim that the government penalizes Fourth Amendment rights when it conditions acceptance of Aid to Families with Dependent Children on the recipient's submission to warrantless and suspicionless searches. Recognizing the individual's initial option to accept or refuse the benefits, the Court found no coercive action by the government. The beneficiary remained free to choose between forgoing benefits and preserving the privacy of her home, or accepting the benefits and consenting to the searches. *Id.* at 317-18. In contrast to the facts in *Simmons*, the government had not set up one constitutional right against another. It had merely placed a condition on a government benefit, one that it was no less entitled to impose than the individual was entitled to reject.

Outside the context of the Fourth Amendment, the Court regularly permits individuals to waive criminal procedure rights that the United States Constitution gives them in return for certain government benefits. Indeed, much of the criminal law involves instances in which the defendant must make a difficult choice between pursuing one line of factual development over another or advancing one legal right over another. Yet, in case after case, the Court has permitted individuals -- the ultimate beneficiaries of these rights -- to bargain them away for desired government benefits or perceived advantages. *See Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (the prosecutor may present "the defendant with the unpleasant alternative of forgoing trial or facing charges on which he was plainly subject to prosecution"); *Baxter v. Palmigiano*, 425 U.S. 308 (1975) (permitting State to require inmates to choose between (1) waiving their Fifth Amendment privilege to testify at a disciplinary hearing or (2) remaining silent and having an adverse inference drawn from their silence); *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973) (prosecutor may encourage guilty plea even though it requires waiver of jury trial right); *McGautha v. California*, 402 U.S. 183, 213 (1971) (even though "a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the right involved"). *See also South Dakota v. Dole*, 483 U.S. 203, 210 (1987); *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 143-144 (1947). Similar issues exist in *Ohio Adult Parole Authority v. Woodard*, No. 96-1769.

As these cases make clear, the Constitution in general and the Fourth Amendment in particular do not forbid individuals from opting to waive constitutional rights in

return for government benefits. Only when the government "'benefit to be gained is that afforded by another provision of the Bill of Rights," as it was in *Simmons*, 390 U.S. at 394, or when the government pressure rises to the level of coercion, does a Fourth Amendment violation occur.

B. Pennsylvania Acted Well Within These Requirements In Conditioning Mr. Scott's Parole On Consent To Future Searches Of His Residence By Parole Officers.

Pennsylvania complied with these requirements in full. The State's discovery of evidence of a parole violation during a suspicionless search of Mr. Scott's residence therefore should be admissible at his parole revocation hearing.

1. The Nature Of The Lower Court Decision.

On April 2, 1982, Mr. Scott received a 10 to 20 year prison term for third degree murder. After serving 10 years of his term, the Pennsylvania Department of Corrections released him on parole subject to several enumerated conditions. Among other things, he signed a document entitled "Conditions Governing Parole/Reparole," which provided in part:

> I expressly consent to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any items, in [sic] the possession of which constitutes a violation

> of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.

Pet. App. 2a; *id*. at 30a n.3.

Despite the clear language of the consent form and despite Mr. Scott's voluntary signature to it, the Pennsylvania Supreme Court held that the form did not allow parole officials to conduct a suspicionless search of his residence. Relying on one of its earlier decisions, the court reasoned as follows:

> "[T]he parolee's signing of a parole agreement giving his parole officer permission to conduct a warrantless search does not mean either that the parole officer can conduct a search at any time and for any reason or that the parolee relinquishes his Fourth Amendment right to be free from unreasonable searches. Rather, the parolee's signature acts as acknowledgement that the parole officer has a right to conduct reasonable searches of his residence listed on the parole agreement without a warrant. . . . [A] search will be deemed reasonable if the totality of the evidence demonstrates: (1) that the parole officer had a reasonable suspicion that the parolee had committed a parole violation, and (2) that the search was reasonably related to the parole officer's duty."

Pet. App. 9a-10a (quoting *Commonwealth v. Williams*, 692 A.2d 1031, 1036 (1997)).

2. No Independent And Adequate State Ground Exists.

Before addressing the merits of this analysis, it bears acknowledging a potential independent and adequate State ground. Two plausible readings of this portion of the decision exist. The first is that the court was construing the language of the consent form from the perspective of its drafters -- that as a matter of State law they meant the condition to require only the waiver of warrantless searches, not suspicionless ones. The second looks at the consent form from the perspective of its reader (the parolee) -- that as a matter of Fourth Amendment law the language of the form waived only the right to oppose warrantless searches, not suspicionless ones. The one reflects the meaning of the words to the drafter; the other reflects the meaning of the words to the individual. The former would present an independent and adequate State ground, because the State court retains final authority to construe the meaning of Pennsylvania's legislative and administrative acts. The latter would not, because this Court has final authority to determine when and to what extent an individual has waived rights under the United States Constitution.

Because both readings are plausible and because the Pennsylvania Supreme Court did not provide a clear statement that it was independently relying on State law to make this decision, the default rule applies. Under *Michigan v. Long*, 463 U.S. 1032 (1983), the absence of clear direction means that this component of the decision rests on federal grounds and may be reviewed by the Court. *See also Ohio v. Robinette* 117 S. Ct. 417 (1996).

3. The Lower Court Erred.

Turning to the merits, the lower court misconstrued the Fourth Amendment as well as several pertinent decisions of this Court interpreting it. States are fully permitted to condition early release on a parolee's consent to suspicionless searches for purposes of ferreting out violations of State parole requirements. Because inmates do not have a constitutional right to avoid lawful incarceration, *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), conditioning early release on a waiver of Fourth Amendment rights does not place Mr. Scott in the "intolerable" position in which "one constitutional right should have to be surrendered in order to assert another," *Simmons*, 390 U.S. at 394.

Recognizing the unique status of parolees, the Court has previously acknowledged the permissibility of treating parolees differently from other individuals.

> To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen.
>
> * * *
>
> [W]e find that the State's interests are several. The State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty.

Morrissey, 408 U.S. 471, 478, 483 (1972) (emphasis added). *See also Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987).

Nor on this record did coercion of any kind occur. Just as states have no obligation to forgo full imposition of a lawfully- imposed sentence, offenders in Pennsylvania have no obligation to accept the terms of early release. One study indicates that up to one third of inmates reject early release in view of the difficult conditions placed on it. J. Petersilia, *When Probation Becomes More Dreaded Than Prison*, Federal Probation, March 1990, 23. Under these circumstances, it cannot tenably be argued that the State has engaged in coercion masquerading as choice. Indeed, the choice the State offered Mr. Scott presents far less pressure than the difficult choices the Court has allowed governments to present to other inmates, criminal suspects and criminal defendants. *See McGautha v. California*, 402 U.S. 183, 213 (1971); *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978); *Chaffin v. Stynchombe*, 412 U.S. 17, 31 (1973).

The Fourth Amendment likewise permits individuals to consent to searches on an instance-by-instance basis as well as with respect to all future searches. As a matter of logic and precedent, nothing in the provision requires individuals to provide their consent one search at a time. The guarantee equally allows retail and wholesale consents to search.

Neither is it appropriate to discount the assortment of reasons why a prisoner would waive such rights. In addition to obtaining early release, prisoners may agree to such a condition because they have no intention (at the time) of committing a parole violation or, better yet, prefer the threat of unannounced searches as an inducement to follow parole guidelines. Many citizens want to comply with the law, and for some it may be as liberating to let the truth be known as

it is to hide the truth in the interest of staying out of jail. Yet such moral pressures, all attributable to the individual and not the State, do not show the kind of governmental coercion that undermines a Fourth Amendment waiver. *See Schneckloth, supra*; *cf. Colorado v. Connelly*, 479 U.S. 157, 170 (1986) ("the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion'") (quoting *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)); *United States v. Washington*, 431 U.S. 181, 187 (1977); *Minnick v. Mississippi*, 498 U.S. 146, 167 (1990) (Scalia, J., dissenting).

A decision making such time-respected choices unconstitutional, moreover, would threaten the basic underpinnings, and hence the continued viability, of probation and parole. Restrictive conditions are an essential tool for making sure that probationers and parolees hew to the path of rehabilitation. What States will be willing to shorten criminal sentences without being able to provide the utmost assurance to their citizens that the parolees' rehabilitative progress is being closely monitored? Indeed, without such conditions, it is no exaggeration to conclude that the availability of those programs would be severely restricted.

Nor can there be any doubt that Mr. Scott consented to the search conducted here. He agreed as a condition of early release that parole officers could conduct a search of his residence without a warrant. The requirement of a warrant has long been deemed, and therefore fairly perceived, as the essence of the privacy right established by the Fourth Amendment. *See Steagald v. United States*, 451 U.S. 204, 214 n.7 (1981) (citing *Payton v. New York*, 445 U.S. 573, 602-03 (1980)). By waiving the right to insist on a warrant before officers searched his residence, Pet. App.

2a, Mr. Scott clearly waived the right to insist on any level of suspicion (customarily defined by the existence of a warrant) before officers searched his residence.

The State's authority to require consent to such searches, it bears adding, does not make parolees complete strangers to the protections offered by the Fourth Amendment. The consent requirement, all agree, must itself still be reasonable. *See Griffin, supra*; *O'Lone v. Shabazz*, 482 U.S. 342, 349 (prison regulations allegedly infringing constitutional rights are themselves constitutional so long as they are "reasonably related to legitimate penological interests") (internal quotation omitted). Thus, in spite of the consent form filed by Mr. Scott, the parole officers' search had to be reasonable in nature and duration, as well as connected to legitimate parole considerations, even though the search itself no longer required reasonable suspicion. Plainly, the State followed these requirements here. For like reasons, it is as appropriate to impose such waivers through consent forms as through State statutes or regulations. *See Griffin, supra*; *Zap, supra*.

A final word deserves consideration. In our view, the harder question in this case is whether Pennsylvania overprotected Mr. Scott's rights, not whether it violated them. Several decisions from the Court suggest that in view of the special needs of State parole programs, Pennsylvania could have engaged in such suspicionless searches even without Mr. Scott's consent. *See Veronia School Dist. 47J v. Alton*, 115 S. Ct. 2386 (1995); *National Treasury Employee Union v. Von Raab*, 489 U.S. 656, 674-75 (1989); *Skinner v. Railway Labor Executive Assoc.*, 489 U.S. 602, 619 (1989); *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967). Just as the Court has permitted random searches of prison cells, *see Hudson v. Palmer*, 468 U.S. 517, 529 (1984), so too it has permitted such seaches in a wide range

of administrative settings that present special safety considerations to the government and diminished privacy expectations for the individual. Under these cases, it would seem to follow that a parolee, no less than those "who choose to participate in a closely regulated industry," "have reason to expect intrusions upon normal rights and privileges, including privacy." *Veronia*, 115 S. Ct. at 2393. Here, however, Pennsylvania went further. It sought -- and obtained -- consent to search. The question whether the State had to do so need not be addressed.

II. The Exclusionary Rule Does Not Apply To -- And Should Not Be Expanded To Apply To -- Probation and Parole Revocation Proceedings.

Even if the Court concludes that Pennsylvania violated Mr. Scott's Fourth Amendment rights, it still should reverse the lower court decision. The Pennsylvania Supreme Court erred in extending the exclusionary rule to this setting.

A. The Court Has Applied The Exclusionary Rule Only In The Context Of The Criminal Trial And Direct Review.

The language of the Fourth Amendment does not compel the exclusion of evidence obtained in violation of its requirements, and thus "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *United States v. Leon*, 468 U.S. 897, 906 (1980) (citing *Stone v. Powell*, 428 U.S. 465, 486 (1976)). The exclusionary rule, instead, "was a judicially created means of effectuating the rights secured by the Fourth Amendment" in discrete settings, *Powell*, 428 U.S. at 482, a rule that did not apply to the federal

government until 1914, *see Weeks v. United States*, 232 U.S. 383 (1914), and one that did not apply to the States until 1961, *see Mapp v. Ohio*, 367 U.S. 643 (1961).

"The primary justification for the exclusionary rule" is "deterrence" -- to discourage "police conduct that violates Fourth Amendment rights." *Powell*, 428 U.S. at 486. *See Calandra*, 414 U.S. at 348 ("the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect"). Because any "[r]eparation comes too late" to protect the invasion of privacy that accompanies a Fourth Amendment violation, *Linkletter v. Walker*, 381 U.S. 618, 637 (1965), the exclusionary rule is not a "personal constitutional right . . . calculated to redress" the injury to the victim of the invalid search or seizure, *Powell*, 428 U.S. at 486. Rather, it creates a disincentive to violate the provision by suppressing evidence obtained in disregard of its terms.

At the same time, the Court has recognized that the "policies behind the exclusionary rule" are relative, "not absolute." *Powell*, 428 U.S. at 488. The benefits of deterrence, the Court has made clear, do not invariably outweigh "the public interest in determination of truth at trial" or the costs of suppressing pertinent evidence of administrative misconduct. Accordingly, "application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348. Thus far, the Court has generally restricted application of the exclusionary rule to the criminal trial and direct review. *See Mapp v. Ohio*. It has declined to extend the rule to grand jury proceedings, *see United States v. Calandra*, 414 U.S. 338, to the impeachment of criminal defendants, *Walder v. United States*, 347 U.S. 62 (1954), to administrative proceedings, *see Immigration and Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032

(1984), to civil proceedings commenced by another sovereign, *see United States v. Janis*, 428 U.S. 433 (1976), and to federal habeas review of State-court criminal convictions, *see Stone v. Powell*, 428 U.S. 465 (1976).

B. The Exclusionary Rule Should Not Be Extended To Parole Revocation Proceedings.

Conceived in a spirit of judicial "pragmati[sm]," *Powell* 428 U.S. at 488, the exclusionary rule thus has been extended only to those areas where the benefits of deterrence outweigh the considerable costs of suppressing relevant evidence. Yet such cost-benefit balancing, simply put, does not favor extending the rule to parole revocation proceedings.

First, the criminal trials covered by *Mapp* differ in kind from the parole revocation proceedings covered here. Unlike criminal trials, revocation hearings do not focus on the guilt or innocence of an individual concerning a past event. They consider how to rehabilitate offenders and how to ensure that the public does not suffer from premature releases of still-dangerous prisoners. *Gagnon v. Scarpelli*, 416 U.S. 778, 783-791 (1973). Indeed, most proceedings do not even result in reincarceration, confirming the non-punitive nature of the hearing. Bureau of Justice Statistics, U.S. Dept. of Justice, T. Bonczar, *Special Report Characteristics on Adults on Probation 1995*, Special Report, Dec. 1997, at 10 (noting that incarceration occurs in only 29% of revocation proceedings); National Institute of Corrections, U.S. Dept. of Justice, *Status Report on Parole, 1995: Results of An NIC Survey* (Nov. 1995) at 8-9 and table 16 (outlining alternatives to reincarceration).

Nor do revocation proceedings have the same adversarial nature that criminal trials do. The unique nature

of the issues involved -- rehabilitation and public safety -- require a freer flow of information and more flexible procedures than a criminal trial allows. *Gagnon*, 411 U.S. at 782-790. As the Court has observed in concluding that information may be considered in revocation proceedings that is not admissible in criminal trials:

> We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry, the process should be flexible enough to consider evidence . . . that would not be admissible in any adversary criminal trial.

Morrissey v. Brewer, 408 U.S. 471, 489 (1972); *see also Lopez-Mendoza*, 468 U.S. at 1048-1049. In the end, little symmetry exists between a criminal trial's focus on the guilt or innocence of an individual and a revocation hearing's focus on public safety, rehabilitation and the prevention of future harm. The revocation hearing more closely parallels administrative hearings, to which the exclusionary rule does not apply, *see Lopez-Mendoza*, 468 U.S. at 1038-39, than criminal trials, to which the rule does apply, *see Mapp*.

Second, the policy of deterring future Fourth Amendment violations, the "primary justification" for the exclusionary rule, *Stone v. Powell*, 428 U.S. at 486, does not advance the lower court's decision. Neither respondent nor the lower courts have identified any pattern and practice of violations of parolees' Fourth Amendment rights, or for that matter any empirical evidence establishing that application of the exclusionary rule in this setting would in fact deter Fourth Amendment violations.

Nor is it likely that such a deterrent effect could be shown. Police officers and parole officials operate under very different sets of institutional incentives. The police try to obtain criminal convictions. Parole officials try to move rehabilitated convicts out of overcrowded (and costly) prisons and back into society. The former succeeds by winning criminal trials; the latter succeeds by rehabilitating convicts and getting them out of jail. *See Morrissey*, 408 U.S. at 483-484; R. Prus & J. Stratton, *Parole Revocation Decisionmaking: Private Typings and Official Designations*, Federal Probation, March 1976, 48, 50-51.

What is more, State parole officials already have strong incentives for respecting the guarantees of the Fourth Amendment. All State officials, of course, have a duty to obey the Constitution, one that this Court's precedents presume they will follow. *See Agostini v. Felton*, 117 S. Ct. 1997, 2010-2011 (1997). Some States, moreover, already have exclusionary rules applicable to revocation proceedings under State law, *see, e.g., State v. Marquart*, 945 P.2d 1027 (N.M. App. 1997); *State ex rel. Juvenile Dept. of Multnomah County v. Rogers*, 836 P.2d 127 (Or. 1992); *State v. Lapman*, 724 P.2d 1092 (Wash. App. 1986), which themselves limit the need for federalizing this area, *Janis*, 428 U.S. at 445 n.14. Empirical studies also suggest that corrections officials respond to findings of improper conduct by changing offending policies and practices. C. McCoy: *The Impact of Section 1983 Litigation on Policy Making In Corrections*, Federal Probation, Dec. 1981, 17.

Improper revocations also would undermine the institutional interests of probation and parole agencies. On the most fundamental level, unwarranted revocations would impede one of the core administrative functions of these agencies, alleviating prison and jail overcrowding. The major professional organizations and accrediting agencies

governing the field also require that agencies strive to observe offenders' rights. American Correctional Association, *Standards for Adult Probation and Parole Field Services*, Standard 2-3160 (2d Ed. 1981) ("Searches should comply with legal requirements"); American Probation and Parole Association: *Code of Ethics* at ¶¶ 2, 3. Abuse of the revocation process would violate those standards, risking the agencies' accreditation and professional standing.

Individual parole officers themselves have strong personal incentives to avoid wrongful revocations. Most officers view revocations as an indication that they have failed and most recognize that initiating too many revocation proceedings may adversely affect their professional standing. R. Prus & J. Stratton: *supra* at 50-51. Similarly, probation and parole officers have become increasingly concerned about the potential for individual tort liability. Prus & Stratton, *supra* at 51.

Ultimately, the Court has refused to presume that expansion of the rule beyond the criminal trial setting will deter misconduct and has required "convincing indication[s]" that any proposed expansion will effectively supplement existing deterrents. *Lopez-Mendoza*, 468 U.S. at 1046. Instead, it has looked for proof to justify any proposed expansion and has characterized the rule as a "grudgingly taken medicant" of which "no more should be swallowed than is needed." *Janis*, 428 U.S. at 454, n.29. Respondent has not shown that any such strong medicine is needed here.

Third, extension of the rule will hamstring the effective operation of parole programs and cause a host of "secondary costs that flow from the less accurate or more cumbersome adjudication" following application of the rule. *Lopez-Mendoza*, 468 U.S. at 1041. "Applying the

exclusionary rule in proceedings that are intended not to punish past transgressions but to prevent their continuances or renewal would require [decisionmakers] to close their eyes to ongoing violations of the law." *Id.* at 1046. Extension of the rule would deprive officials of relevant information necessary to achieve the bookend objectives of a responsible parole system -- rehabilitation and protection of the public.

C. Nor Should The Exclusionary Rule Apply When The Officer Knows That The Resident Is A Parolee.

The lower court agreed with much of the above analysis. Yet it still concluded that the exclusionary rule should apply under some circumstances, namely whenever the investigating officer knows or has reason to know the status of the parolee at the time of the search. In the lower court's view, when the investigator knows the status of the parolee and "there is no reasonable suspicion of a parole violation, there is a need to apply the exclusionary rule to the revocation process since otherwise there is nothing to deter a parole agent from conducting an illegal search or engaging in other illegal activity to obtain evidence." Pet. App. 15a. This is wrong on several fronts.

The continued existence of the exclusionary rule for criminal proceedings already acts as a strong deterrent against unconstitutional searches of parolees, whether the police know their status or not. An officer that suspects criminal activity is afoot is as apt to be interested in getting an arrest (and conviction) as a parole revocation. Only the oddest of fact patterns would tempt an officer to sacrifice a potential criminal conviction in order to obtain a parole revocation.

For like reasons, a knowledge-based approach does not in fact offer any additional deterrence against unauthorized searches. A police officer who conducts an unauthorized search violates the Constitution in one of two ways: Either the violation was inadvertent (*i.e.*, negligent), or it was intentional. When negligence is the source, no extra deterrence follows from a knowledge-based limitation. The whole point of such a limitation is to prevent intentional, not negligent, unconstitutional searches -- in other words, to prevent just those searches that occur because the officers know the individuals to be parolees and think they can get away with the violations because the evidence may be used in a parole revocation proceeding. A knowledge-based limitation simply will not deter inadvertent violations; it just will exclude pertinent evidence.

No doubt, the same cannot be said for intentional violations. A knowledge-based limitation might well deter such transgressions, but it still offers no more deterrence than already exists. When police officers intentionally violate a citizen's constitutional rights, the exclusionary rule is the least of their worries. Such conduct exposes officials to individual-liability claims, internal discipline and worse. These risks to the officer's welfare provide all the deterrence anyone needs. A contrary view, moreover, posits a law enforcement officer more concerned about the potential exclusion of evidence than the potential for a money-damages action and self-advancement. While it might be said that such concern for the public welfare remains the hallmark of being a police officer, it hardly applies to the malevolent parole officer that the lower court conjured in addressing this issue. That court's contrary conclusion should be reversed.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to reverse the decision below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PENNSYLVANIA BOARD OF PROBATION AND PAROLE,

Petitioner,

—v.—

KEITH M. SCOTT,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE SUPREME COURT OF PENNSYLVANIA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF PENNSYLVANIA, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. The ACLU of Pennsylvania is one of its statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many Fourth Amendment cases. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of concern to the ACLU and its members.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster integrity, independence, and expertise of the criminal defense bar; and to promote the proper and fair administration of criminal justice. Composed of more than 9,000 attorneys and 28,000 affiliate members in 50 states, NACDL is recognized by the American Bar Association as an affiliate organization. It also has full representation in the ABA's House of Delegates. NACDL strives to defend the liberties guaranteed by the Bill of Rights.

STATEMENT OF THE CASE

On April 2, 1982, respondent Keith M. Scott was sentenced to a ten to twenty year term of imprisonment on his

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

plea of *nolo contendere* to third degree murder. On September 1, 1993, respondent was paroled subject to several conditions. One condition stated:

> I expressly consent to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any item, in [sic] the possession of which constitutes a violation of parole/ reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.

J.A. 7a.

On February 4, 1994, parole agents acting pursuant to a warrant issued by petitioner, the Pennsylvania Board of Probation and Parole, arrested respondent in a diner for various parole violations. While respondent was taken to jail, Agent Mundro drove to respondent's home with Dorothy Hahn, a friend of respondent who had been with him in the diner. Although respondent was living at the time with his mother and stepfather, no one was home when the agents arrived. Mundro instructed Hahn to open the door with respondent's keys, which she did. Hahn then called respondent's mother, Dorothy McDaniel.

When Mrs. McDaniel arrived home, Mundro informed her that he was going to search respondent's bedroom and asked her to identify which room was his. (He also told her that the agents would find it on their own if she did not cooperate.) After looking through the bedroom, Mundro searched an adjacent room without asking Mrs. McDaniel's consent and found five unloaded firearms under a sofa. In addition, he found a compound bow and three arrows in a closet. Mrs. McDaniel informed the agents that all the weapons belonged to her husband. J.A. 80-82a; J.A. 85-89a. They were nonetheless seized.

Respondent moved to suppress the weapons at his parole revocation hearing. In opposition to that motion, Agent Mundro testified that he did not need the permission of a homeowner to search a parolee's approved residence. Mundro further explained that he searched respondent's house because Agent Gallo, respondent's parole agent and the official representing petitioner at the revocation hearing, had suggested that guns might be there. J.A. 83a, 92a. The hearing officer admitted the evidence. J.A. 84-85a.

That ruling was reversed by the Commonwealth Court of Pennsylvania, which held that the search violated the Fourth Amendment because it "was conducted without the owner's consent and without a statutory or regulatory framework authorizing such a search." Pet.App. 31a. The court specifically found that the consent condition contained in respondent's parole agreement did not justify the search. Finally, the court concluded that the exclusionary rule was applicable to respondent's revocation hearing. Pet.App. 30a, n.3, 37a.

The Pennsylvania Supreme Court affirmed. It began its opinion by noting that parolees are protected against unreasonable searches of their homes. It then ruled, as a matter of state law, that respondent's right against "unreasonable searches and seizures [was] unaffected by his signing of the consent to search provision." Pet.App. 10a. The court reached this conclusion by citing an earlier state law ruling in *Commonwealth v. Williams*, 692 A.2d 1031, 1036 (Pa. 1997), for the proposition that the parole release form was limited in scope and merely acknowledged "'that the parole officer has a right to conduct reasonable searches of [the] residence listed on the parole agreement without a warrant.'" Pet.App. 9-10a. Finally, the court held that the search in this case violated the Fourth Amendment because it lacked reasonable suspicion. Pet.App. 10a.

Based on that finding, the Pennsylvania Supreme Court agreed that the exclusionary rule applied on the facts of this case. In a carefully crafted opinion, the court held that the deterrent purpose of the exclusionary rule requires the suppression of illegally obtained evidence at a revocation hearing when the agent conducting the search is aware in advance of the suspect's parole status. Otherwise, the court recognized, the agent "'ha[s] nothing to risk: If the motion to suppress in the criminal proceedings [is] denied, defendant would stand convicted of a new crime; and if the motion [is] granted, the defendant would still find himself behind bars due to revocation of [parole].'" Pet.App. 13a, quoting *United States v. Winsett*, 518 F.2d 51, 54, n.5 (9th Cir. 1975). Thus, in these limited circumstances at least, "there is a need to apply the exclusionary rule to the revocation process since there is nothing to deter a parole agent from conducting an illegal search or engaging in other illegal activity to obtain evidence." Pet.App. 15a.

This Court granted the petition for a writ of *certiorari* to decide whether the exclusionary rule was appropriately applied in this case. The Court also invited the parties to brief the following issue: "Must a search of a parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole?" 118 S.Ct. 554 (1997).[2]

[2] *Amici* agree with respondent that the second question may not be fairly presented by this record since the Pennsylvania Supreme Court has held as a matter of state law that the parole release form signed by respondent did not constitute "consent" to searches that are unsupported by reasonable suspicion.

SUMMARY OF ARGUMENT

The search of respondent's home was not a valid consent search. Petitioner insists that a suspicionless search was legal because respondent signed a mandatory parole condition form that waived his Fourth Amendment rights. Consent searches are not controlled by a waiver-of-rights theory; instead, a consent search is judged by a voluntariness test that considers the totality of the circumstances surrounding the search.

This Court's administrative search cases provide a helpful framework for analyzing the search of respondent's home. Recent administrative search cases have abandoned theories of implied consent, and judge the reasonableness of such searches on a case-by-case basis. In concluding that the search of a parolee's home must be based on reasonable suspicion even where a parolee has signed a consent form, the court below followed this Court's precedents and considered the totality of the circumstances when determining the reasonableness of that search.

The suspicionless search of respondent's home also conflicts with the reasoning of *Griffin v. Wisconsin*, 483 U.S. 86 (1987). Although Wisconsin had a regulation that "ma[de] it a violation of the terms of probation to refuse to consent to a home search," *id.* at 871, *Griffin* accorded no constitutional weight to this consent rule in judging the reasonableness of the search of a probationer's home. Instead, *Griffin* emphasized the existence of a regulatory framework that provided guidance and standards for probation officers to determine when "reasonable grounds" existed for a particular search. Unlike the search in *Griffin*, no administrative rules controlled the search of respondent's home.

Because parolees do not forfeit all Fourth Amendment rights, the court below properly assessed the deterrent value of the exclusionary rule in cases of this sort. As the Penn-

sylvania Supreme Court recognized, a parolee who violates the conditions of his parole can, and usually is, returned to jail without the necessity of a formal criminal trial. Thus, the fact that illegally seized evidence cannot be used at a criminal trial is unlikely to deter an agent who is accumulating evidence for a parole revocation hearing. Conversely, the core values of the Fourth Amendment can only be enforced if the exclusionary rule is applied to parole revocation hearings under these circumstances. That is all the lower court held in this case and all, *amici* respectfully submit, that this Court should address.

ARGUMENT

I. THE SEARCH OF RESPONDENT'S HOME WAS NOT A VALID CONSENT SEARCH

Petitioner contends that the suspicionless search of respondent's home does not violate the Fourth Amendment because respondent consented to this search as a condition of parole. Brief for Petitioner at 20 (respondent "expressly consented to warrantless searches by parole agents"). Implying that parole is an "act of grace" offered by the state, petitioner argues that there is "no requirement that a parolee accept the parole conditions; he is free to reject the conditions and serve out his sentence in prison." *Id.* Once respondent signed the consent form contained in his parole agreement, petitioner argues, he also accepted the state's authority to invade his privacy whenever agents decided such action would advance the penological goals of parole. *Id.* at 23-24.

The United States, as *amicus curiae,* adopts a similar approach to the suspicionless search of respondent's home. According to the Solicitor General, respondent waived his Fourth Amendment rights by accepting parole with the condition that he consent to warrantless searches. Persons may

"enter into arrangements with the government under which the individual relinquishes constitutional rights for a promise of favorable treatment." Brief for the United States at 22. Provided the individual is "accurately apprised of the options available to him," these agreements are constitutionally valid even when the person "is forced to choose between unattractive alternatives." *Id.* at 23. In this case, the United States contends, the parole agreement represented a valid waiver of respondent's Fourth Amendment rights, and thus furnished respondent's "consent" to the search of his home by Agent Mundro.

Both petitioner and its *amici* miss the point of this Court's consent doctrine under the Fourth Amendment. First, *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), established that consent searches are not controlled by a waiver-of-rights theory but are judged by a voluntariness test that considers the totality of the circumstances surrounding the search.[3] Thus, petitioner's consent theory reflects an antiquated vision of the Fourth Amendment.

Second, judged by a totality-of-the-circumstances test that does not rely on some fictional waiver, petitioner's claim that respondent's "consent" authorized the search of his home ignores the facts of this case. As far as the record reveals, respondent never gave his consent. Nor did Mrs.

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[3] *See* 412 U.S. at 246 ("[T]here is nothing in the purposes or application of the waiver requirements of *Johnson v. Zerbst* [304 U.S. 458 (1938)] that justifies, much less compels, the easy equation of a knowing waiver with a consent search"). Curiously, although petitioner emphasizes the consent condition that respondent signed, and argues that respondent "expressly consented to warrantless searches by parole agents," Brief for Petitioner at 20, petitioner fails to cite *Schneckloth.* The Solicitor General's only reference to *Schneckloth* is a conclusory quote that "'a search conducted pursuant to a valid consent is constitutionally permissible.'" Brief for the United States at 22, quoting *Schneckloth,* 412 U.S. at 222.

McDaniel, who shared the house with respondent. *Cf. Illinois v. Rodriguez*, 497 U.S. 177, 180 (1990)(third-party with common authority over the premises can consent to the search of a home). Mrs. McDaniel acquiesced to the search of respondent's bedroom only after Agent Mundro told her that he would search the house regardless of her consent. J.A. 80-83a. Her consent was neither sought nor given before agents searched the adjoining room where the weapons were ultimately found.

In an analogous context, this Court has recognized that a gun dealer who provides access to his books and inventory only after a law enforcement officer asserts his authority to conduct a warrantless search has not "consented" for Fourth Amendment purposes. *United States v. Biswell*, 406 U.S. 311, 315 (1972). Where an officer claims authority to search, as Agent Mundro did in this case, "the legality of the search depends not on consent but on the authority of a valid statute" or other administrative framework that serves to limit the discretion of the officer. *Id.* Here, no such framework exists. To the contrary, Agent Mundro openly admitted at the parole revocation hearing that he felt his authority to search was unlimited. *See* p.3, *supra*. Such a broad claim of authority is fundamentally inconsistent with the Fourth Amendment. It cannot be sustained in this case on the basis of consent for the simple reason that neither respondent nor his mother consented to this search.[4]

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[4] Although characterized as a form of "consent," the conditional parole release form signed by respondent functions, in reality, as a mandatory rule applicable to all parolees. As petitioner concedes, respondent would not have been granted parole without signing the form. *See* Brief for Petitioner at 20 ("There is, of course, no requirement that a parolee accept the parole conditions; he is free to reject the conditions and serve out his sentence in prison."); Cohen & Gobert, THE LAW OF PROBATION AND PAROLE §5.07 at 205 (1983)("Any right to refuse probation or pa- (continued...)

The Court's administrative search cases further undermine petitioner's consent rationale and demonstrate the degree to which Fourth Amendment jurisprudence has shifted in favor of a totality-of-the-circumstances test.[5] Prior to *Schneckloth*, the Court permitted the granting of licenses, contracts or other privileges conditioned on the waiver of Fourth Amendment rights by parties doing business with the government. For example, in *Zap v. United States*, 328 U.S. 624, 628 (1946), the Court noted that when a federal contractor, "in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." *Id.*[6]

Relying on similar reasoning, petitioner asserts that respondent retains no Fourth Amendment interest in his home

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[4] (...continued)
role, moreover, is limited. The offender can only accept or reject the entire package of conditions; there is no right to accept some conditions but not others"). In the language of the Fourth Amendment, therefore, the parole release form does not represent a free and voluntary choice to consent to all searches; rather, it is a rule all parolees must obey. It thus closely resembles the administrative rule that Wisconsin unsuccessfully relied on to justify warrantless searches in *Griffin v. Wisconsin*, 483 U.S. at 871. *See* pp.14-15, *infra*.

[5] *Amici* do not mean to equate the law enforcement search of respondent's home with the regulatory search of a licensed business. This Court has frequently recognized that privacy interests are most acute in the home. But, for that very reason, the rejection of the waiver theory in the administrative search cases has even added force here.

[6] Even while recognizing the government's power to extract waivers of Fourth Amendment rights from government contractors, *Zap* cautioned that this power was not without limits: "*Whatever may be the limits of that power of inspection*, they were not transcended here." 328 U.S. at 628 (emphasis added).

because he signed a consent form authorizing searches as a condition of his parole. But, this view of the Fourth Amendment has been repudiated even when dealing with the administrative search of a business establishment. Contrary to petitioner's outdated view, the modern Court's administrative search cases forsake theories of implied consent and assess the reasonableness of administrative searches on a case-by-case basis. *See* 4 Wayne F. LaFave, SEARCH AND SEIZURE §10.2(c), at 412 (3d ed. 1996).

Biswell is particularly instructive. Although the Court ultimately upheld the warrantless search of a gun dealership, it did not rely on the fiction that gun dealers "consent" to any and all administrative inspections required by federal law. Instead, the Court employed a balancing process, which carefully evaluated the totality of the circumstances. As the Court noted, the warrantless search in *Biswell* was authorized by a narrowly drawn statute that posed only "limited threats to the dealer's justifiable expectations of privacy." 406 U.S. at 316. Specifically, the law provided notice to gun dealers that inspections would be confined in time, place and scope; it also informed gun dealers of the inspector's purposes and the limits of his authority to search. *Id.* at 316-17.[7]

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[7] *See also Marshall v. Barlow's, Inc.*, 436 U.S. 307, 338 (1978)(Stevens J., dissenting)(emphasis added):

> In fact, . . . consent is fictional in both [*Biswell* and in inspections of businesses regulated under the Occupational Safety and Health Act] . . . . In both situations, *the validity of the regulations depends not upon the consent of those regulated,* but on the existence of a federal statute embodying a congressional determination that the public interest in the health of the Nation's work force or the limitation of illegal firearms traffic outweighs the businessman's interest in preventing a Government inspector from viewing those areas of his premises which relate to the subject matter of the regulation.

Similarly, in *Donovan v. Dewey*, 452 U.S. 594 (1981), the Court did not rely on a theory of implied consent to uphold the search of underground and surface mines. Though warrantless searches were involved, *Dewey* explained that the federal inspection framework, "in terms of the certainty and regularity of its application, provide[d] a constitutionally adequate substitute for a warrant." *Id.* at 603. As in *Biswell*, *Dewey* employed a balancing analysis that weighed several factors. In particular, the challenged search was authorized by a law that: (1) required the inspection of all mines; (2) defined the frequency of inspections; (3) notified mine operators of the purposes of inspection and the limits of an inspector's task; and (4) mandated a process for "accommodating any special privacy concerns that a specific mine operator might have." *Id.* at 603-04.[8]

Finally, *New York v. Burger*, 482 U.S. 691 (1987), upheld an administrative search aimed at businesses dealing in used automobile parts. *Burger*'s analysis of the challenged warrantless search extended beyond the conclusion that junkyard dealers possess a reduced expectation of privacy in their premises due to the pervasiveness and duration of governmental regulation of the industry. *Id.* at 700. A warrantless search was reasonable provided three criteria were met. Those criteria included: a substantial interest justifying the search; a showing that searches are necessary to promote that interest; and a statutory framework that serves as a proxy for a warrant. *Id.* at 702. This last factor meant that

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[8] *See also id.* at 611 (Stewart, J., dissenting)(objecting that *Dewey* repudiates the implied consent rationale that had been stated in *dicta* in *Barlow's*); LaFave, *supra*, §10.2(c) at 414-15 ("The Court in *Dewey* dealt with the property owner's awareness of the inspection scheme as a matter bearing upon the reasonableness of that scheme, rather than as showing the owner had impliedly consented, and upheld the regulatory scheme without regard to whether it had predated the owner's entry into the regulated business")(footnote omitted).

the search process "must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Id.* at 703.

Respondent's reduced expectation of privacy in his home does not permit the state to concoct fictional notions of consent to eliminate the remainder of his Fourth Amendment rights. Nor does it eviscerate the balancing analysis of the *Biswell-Dewey-Burger* line of cases. To be sure, parolees "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [parole] restrictions.'" *Griffin*, 483 U.S. at 874, quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). But the gun dealers in *Biswell* and the mine operators in *Dewey* also possessed diminished privacy rights in the records, inventory and facilities that were subject to frequent regulatory search. *See Biswell*, 406 U.S. at 315-16; *Dewey*, 452 U.S. at 601-06.

In sum, whether a search of a parolee's home must be based on reasonable suspicion to be valid under the Fourth Amendment "cannot be resolved by any infallible touchstone," *Schneckloth*, 412 U.S. at 229, including the fact that respondent in this case signed a consent form as a condition of parole. "Rather, it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced. It is this careful sifting of the unique facts and circumstances of each case that is evidenced in our prior decisions involving consent searches." *Id.* at 233.[9] What petitioner advocates instead, and what this Court has properly rejected is "the substitution of words for analysis." *United States v. White*, 401 U.S. 745, 785 (1971)(Harlan, J., dissenting).

[9] *See also Ohio v. Robinette*, 519 U.S. __, __, 117 S.Ct. 417, 421 (1996) (emphasizing that because reasonableness "is measured in objective terms by examining the totality of the circumstances," the Court rejects a *per se* rule for determining the validity of a consent to search).

The court below correctly followed the precedents of this Court and considered the totality of the circumstances in determining the reasonableness of the search. Its decision did not turn on an unsound and unrealistic view of consent. To the contrary, the Pennsylvania Supreme Court explained that where a search of a parolee's home is the product of coercive government power and not genuine consent, reasonable suspicion must exist to justify the search.

If adopted, petitioner's view of consent would effectively grant parole officers unchecked discretion to invade the privacy and security of parolees and their families, without even a requirement of reasonable suspicion. Of course, that result would conflict with another precedent of this Court, *Griffin v. Wisconsin*, 483 U.S. 868, which confirmed that one's status as a probationer or parolee does not compel the elimination of all Fourth Amendment protection for such persons.

II. A SUSPICIONLESS SEARCH OF A PAROLEE'S HOME VIOLATES THE REASONING OF *GRIFFIN*

By permitting the warrantless search of a probationer's home on less than probable cause, *Griffin* held that parolees and probationers do not enjoy the same degree of Fourth Amendment privacy as the rest of society. But, by insisting that even the search of a probationer's home must be constitutionally reasonable, the *Griffin* Court recognized that parolees and probationers do not shed all their Fourth Amendment rights.

Thus, the holding of *Griffin* represents a middle ground. On the one hand, the Court acknowledged that su-

pervision of a parolee "is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." 483 U.S. at 874-75. On the other hand, the Court stopped well short of holding that those privacy rights disappear entirely.

Prior to *Griffin*, courts relied on one of three theories to explain why probationers and parolees lack full Fourth Amendment protection: a "constructive custody" theory, which reasoned that parolees had the same rights as prisoners; an "act of grace" theory which allowed the state to attach restrictions on a parolee's privacy; or, a "consent" theory, in cases where parole was conditioned upon the waiver of Fourth Amendment rights. *See* LaFave, *supra*, §10.10 at 758.

Notably, *Griffin* declined to rely on any of these theories in concluding that probationers possess only a limited privacy interest, and that neither the warrant nor probable cause requirements apply to the search of a probationer's home.[10] Indeed, Wisconsin's regulatory framework governing probationers and parolees "ma[de] it a violation of the terms of probation to refuse to consent to a home

[10] *See* LaFave, *supra*, §10.10(a) at 761 ("In upholding the search of a probationer's home without compliance with the usual Fourth Amendment requirements of full probable cause and a search warrant, [*Griffin*] made no mention of the constructive custody theory as a justification") (footnote omitted); *id.* §10.10(b) at 762 ("in the course of recognizing that less demanding Fourth Amendment standards govern as to a probation officer's supervisory search, [*Griffin*] relied not at all upon the 'act of grace' theory"); *id.* at 766 ("it would seem doubtful that any waiver of Fourth Amendment rights obtained as the quid pro quo of a grant of probation or parole could pass muster under *Schneckloth*. Doubtless this explains why [*Griffin*] . . . relied not at all upon the waiver theory").

search."[11] Notwithstanding this mandatory rule, which is the functional equivalent of the consent condition signed by respondent in this case, *Griffin* eschewed any reliance on notions of consent in determining the reasonableness of the search of Griffin's home.

Instead of relying on a mandatory consent rule or upon theories of "constructive custody" or implied consent, all of which minimize in one way or another the serious constitutional implications associated with a warrantless search of a home, *Griffin* balanced the competing interests to reach a conclusion on the overall reasonableness of the search. Essential to that balancing process was the existence of a regulatory framework that provided guidance and standards for probation officers to determine when "reasonable grounds" existed for a particular search. *See Griffin*, 483 U.S. at 873 ("The search of Griffin's home satisfied the demands of the Fourth Amendment because it was carried out pursuant to a regulation that itself satisfies the Fourth Amendment's reasonableness requirement under well-established principles").

Griffin grants parole agents a substantial degree of discretion to monitor the activities of parolees. Nonetheless, *Griffin* did not eliminate Fourth Amendment protection for parolees,[12] nor did it suggest that agents have boundless au-

[11] *Griffin*, 483 U.S. at 871. The relevant provision stated: "When probation or parole begins, an agent shall meet with a client to review or develop written rules and specific conditions of the client's supervision, or both. These rules require that the client shall . . . [m]ake himself or herself available for searches ordered by the agent, including but not limited to body contents searches as defined in DOC §328.21(4)(a), or search of the client's residence or any property under the client's control." Wis. Admin. Code HSS §328.04(3)(k)(1981).

[12] "A [parolee's] home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" 483 U.S. at 873.

thority to conduct suspicionless searches of a parolee's home, as urged by petitioner. To the contrary, *Griffin* cautioned that the "permissible degree [of state intrusion into parolee's privacy] is not unlimited." *Id.* at 875. Petitioner's reading of *Griffin* as allowing a suspicionless search of a parolee's home provided the intrusion relates to the legitimate penological objectives of parole, Brief for Petitioner at 24-25, ignores *Griffin*'s actual holding.

What *Griffin* actually held was that the home search in that case "was 'reasonable' within the meaning of the Fourth Amendment because it was conducted pursuant to a valid regulation governing probationers." 483 U.S. at 880. The regulation referenced by the Court instructed probation officers to "consider a variety of factors in determining whether 'reasonable grounds' exist for a particular search." *Id.* at 871. Thus, *Griffin* placed a deliberate emphasis on the existence of a regulatory scheme. This emphasis was consistent, moreover, with the Court's earlier holdings permitting regulatory searches without warrants or probable cause provided such searches "meet 'reasonable legislative or administrative standards.'" *Id.* at 873, quoting *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967).

As in the administrative search cases discussed above, the regulatory scheme in *Griffin* provided a measure of control and guidance for probation officers deciding when to intrude upon a probationer's privacy. That regulatory program did not leave officers with unchecked discretion to search. Rather, searches were permitted only when "reasonable grounds" existed for a search. Wisconsin did not suggest and the Court did not hold that the state's legitimate needs for supervision required suspicionless searches. *See Griffin v. Wisconsin*, No. 86-5324, Transcript of Oral Arg. at 48 (statement of counsel for Wisconsin: "Justice Scalia, my argument is that the federal Constitution permits searches of a probationer's residence by a probation officer

on less than probable cause, on what we would call reasonable grounds or reasonable suspicion").

Unlike the search in *Griffin*, no regulatory or administrative framework controlled the search of respondent's home.[13] When state agents are permitted to invade a parolee's home without reasonable suspicion of a parole violation, and without statutory or administrative guidance, they are effectively granted authority to conduct an unreasonable search. Such a search violates the rule and spirit of *Griffin*. Rather than endorse that outcome, the court below required reasonable suspicion of a parole violation before proceeding with a search of a parolee's home. As in *Griffin*, this approach balances the privacy rights of the parolee and his family with the state's legitimate interests in rehabilitation and community safety.[14]

Petitioner's contention that the consent agreement extracted from every parolee as a condition of parole permits

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[13] Pet.App. 5-6a. In 1995, subsequent to the search of respondent's home, the Pennsylvania General Assembly enacted a legislative framework for searches by parole agents. That framework includes a provision, which states: "'[a] property search may be conducted by any [parole] agent if there is reasonable suspicion to believe that the real or other property in the possession of or under the control of the offender contains contraband or other evidence of violations of the conditions of supervision.'" *Id.* at 16a, n.11.

[14] *See Maryland v. Buie*, 494 U.S. 325 (1990)(rejecting the state's claim that protective sweep of a home is valid without reasonable suspicion when the area may contain someone who is a threat to the police; a protective sweep of a home is permissible only where there is reasonable suspicion that the area to be swept harbors an individual posing a danger to those on the arrest scene); *see also Richards v. Wisconsin*, 520 U.S. __, __, 117 S.Ct. 1416, 1421-22 (1997)(rejecting a blanket rule permitting police to effectuate an unannounced entry of a home whenever they possess a search warrant for narcotics).

suspicionless searches ignores the central purpose of the balancing test endorsed in *Griffin*:

> [U]nder the *Camara* balancing approach[,] no greater intrusions should be made than "are necessary to effect a proper rehabilitation [and to ensure the public's safety]." This is quite different from the simplistic notions that the probationer or parolee is equivalent to a prisoner in terms of his Fourth Amendment rights or that he can lose those rights by virtue of being the recipient of an "act of grace" or by signing them away in order to gain his freedom, for these notions can readily lead to a degree of surveillance which hinders efforts at rehabilitation. This distinction is highlighted in *Griffin v. Wisconsin* . . . .[15]

Thus, the Fourth Amendment's ultimate command of reasonableness must govern the evaluation of the consent form and any searches that it purports to authorize.[16] It necessarily follows from this premise that a mandatory consent rule that effectively grants parole agents a commission to search and seize at will does not satisfy the Fourth Amendment's reasonableness requirement.

[15] LaFave, *supra*, §10.10(c)(footnote omitted), discussing Welsh S. White, "The Fourth Amendment Rights of Parolees and Probationers," 31 U.Pitt.L.Rev. 167 (1969).

[16] *See Robinette*, 117 S.Ct. at 421 (in assessing whether a motorist gave consent to search his car during a traffic stop, the Court "ha[s] long held that the touchstone of the Fourth Amendment is reasonableness").

III. APPLYING THE EXCLUSIONARY RULE ENCOURAGES PAROLE OFFICERS TO RESPECT FOURTH AMENDMENT NORMS

Recognizing that parolees are not stripped of all Fourth Amendment rights, the Pennsylvania Supreme Court required reasonable suspicion to search a parolee's home. That court then conducted a second balancing analysis to determine whether the exclusionary rule should apply when agents violate the Constitution. In finding the rule applicable, the Pennsylvania high court issued a very narrow ruling. It held that if a parole agent is aware of a suspect's parole status and engages in an illegal search, the exclusionary rule applies at a subsequent parole revocation hearing.[17]

This holding is entirely consistent with what this Court has often expressed as the deterrent purpose of the exclusionary rule. *See United States v. Calandra*, 414 U.S. 338, 347 (1974)(the exclusionary rule's "prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures").

Conversely, if the exclusionary rule did not apply in the circumstances of this case,

> there [would be] nothing to deter a parole agent from conducting an illegal search or engaging in other illegal activity to obtain evidence. The parole agent could establish a parole violation by means of illegally obtained

[17] The correctness of this holding is the only exclusionary rule issue before this Court. Accordingly, this Court need not and should not decide whether the exclusionary rule also applies in parole revocation hearings when the evidence is seized by a police officer that is purportedly unaware of the parolee's status. Resolution of that important Fourth Amendment question should await a proper record.

> evidence in a proceeding which places a minimal burden of proof upon the Commonwealth, and the same result would be achieved as if the parolee was criminally tried -- the parolee would be incarcerated.

Pet.App. 15-16a.

Petitioner does not directly quarrel with this reasoning. Instead, petitioner contends that, as a result of the decision below, the exclusionary rule will apply in most revocation hearings since parole agents "always know" the suspect they are investigating is a parolee; "otherwise, the agents would not be interested in his activities or what he may have in his residence." Brief for Petitioner at 32. But that factual observation, even if true, hardly diminishes the force of the legal conclusion that the exclusionary rule is a necessary prophylaxis to ensure that parole officers comply with the Fourth Amendment.

Petitioner's assertion that parole revocation hearings are not criminal trials, *id.* at 29-33, is similarly beside the point. It is precisely because parole revocation hearings provide an alternative route to reincarceration for most parolees that the exclusionary rule *must* apply in these circumstances. Otherwise, there is very little incentive for a parole officer to comply with the Fourth Amendment when searching a parolee's home, and *Griffin*'s conclusion that the Fourth Amendment protects probationers and parolees will be rendered largely meaningless.[18] That result promotes neither privacy nor rehabilitation.

"In evaluating the need for a deterrent sanction, one

[18] *Cf.* Milton A. Loewenthal, "Evaluating the Exclusionary Rule in Search and Seizure," 49 UMKC L.Rev. 24, 29 (1980)(finding that police officers are less likely to comply with the Fourth Amendment if they feel that evidence will be admitted anyway).

must first identify those who are to be deterred." *United States v. Janis*, 428 U.S. 433, 448 (1976). Here, the rule adopted below focuses directly on agents investigating known parolees. Such agents have an obvious interest in acquiring incriminating evidence and the capacity to avoid the customary constraints of the criminal justice process, including most especially the exclusionary rule that would normally apply in a criminal trial. By extending the exclusionary rule to parole revocation hearings under these circumstances, the deterrent impact of the ruling below is precisely focused upon "the offending officer's zone of primary interest." *Id.* at 458.

Petitioner also argues that the exclusionary rule should not apply to parole revocation hearings because the Court has not extended it to collateral contexts. Brief for Petitioner at 27-28. To be sure, this Court has been reluctant to extend the exclusionary rule to proceedings other than the criminal trial itself. *See, e.g., Stone v. Powell*, 428 U.S. 465 (1976); *Calandra*, 414 U.S. at 347; *Janis*, 428 U.S. at 448; *but cf. One Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965)(exclusionary rule applies to forfeiture proceeding because the "object" of the proceeding, "like a criminal trial, is to penalize for the commission of an offense against the law"). At the same time, the Court has cautioned against *per se* rules for determining when the exclusionary rule should apply.[19]

Application of a *per se* rule would be particularly inappropriate here since the revocation hearing is plainly not a "collateral" proceeding for the parole agents involved. In

[19] *See, e.g., Brown v. Illinois*, 422 U.S. 590, 603 (1975). *See also James v. Illinois*, 493 U.S. 307, 322 (1990)(Kennedy, J., dissenting)("[i]mplementation of the rule requires [the Court] to draw certain lines to effect its purpose of deterring unlawful conduct").

fact, the opposite is true. The offending agent's

> primary objective, in practice, will be to use evidence in the [revocation] proceeding. Moreover, here, in contrast to *Janis*, the [parole agents] who effect the unlawful [search] are the same officials who subsequently bring the [revocation] action.

INS v. Lopez-Mendoza, 468 U.S. 1032, 1043 (1984).[20]

The rule established below does not require an inquiry into the subjective intent of parole officers. The question of whether a parole officer knows he is searching the home of a parolee is an objective one. As the court below observed: "Applying the [exclusionary] rule to the instant case, we find that it is clear that Agents Mundro and Gallo knew [respondent] was a parolee. This is established by the fact that immediately prior to the search, the agents arrested [respondent] for parole violations." Pet.App. 17a.

This reliance on objectively verifiable facts echoes the approach taken under the "independent source" rule. As Justice Scalia explained the rule in *Murray v. United States*, 487 U.S. 533, 541 (1988): "The ultimate question . . . is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by

[20] *INS v. Lopez-Mendoza* ruled that the exclusionary rule is inapplicable in a civil deportation hearing. The majority relied upon several factors unique to the context of illegal immigration and deportation. 468 U.S. at 1043-45. Of special relevance to the concern of deterrence was the fact that "the INS has its own comprehensive scheme for deterring Fourth Amendment violations" by training and discipline. *Id.* at 1044. The record in this case reveals no similar program by petitioner to deter Fourth Amendment violations by parole agents.

what they had seen during the initial [illegal] entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant."

Likewise, in this case,

> "[i]f the search is made by a person who is particularly responsible for the individual on conditional release, such as his probation officer or parole officer, then it is clear that there is a need to deter, for such persons will be primarily interested in the question of whether the individuals under their supervision will have their conditional release revoked rather than whether they will be convicted of a new offense."

See LaFave, *supra* §1.6(g) at 180.[21]

Petitioner and its *amici* argue that extending the exclusionary rule to revocation hearings will be useless. Petitioner states that "parole agents under the circumstances of this case are not seeking to convict the parolee of new criminal offenses; therefore, application of the exclusionary rule in this situation would have no deterrent effect whatsoever on police behavior or a criminal prosecution." Brief for Petitioner at 29. The Solicitor General asserts that agents are unlikely to be subjected to the same institutional pressures that confront police officers. Brief for the United States at 16. Each of these claims is badly flawed.

[21] *See also* Mark E. Opalisky, "The Applicability of the Exclusionary Rule to Probation Revocation Proceedings," 17 Mem. St. U. L.Rev. 555, 568 (1987)("when an officer illegally seizes evidence knowing it cannot be introduced in a criminal trial but believing it will nevertheless be accepted in a probation revocation proceeding, then the need to deter is conspicuously present and the rule should apply").

Petitioner's argument, of course, distorts the ruling below. Applying the exclusionary rule here is not meant to deter police officers; rather, the targets of deterrence are parole agents. Moreover, although petitioner does not discuss the matter, there are good reasons to believe that exclusion will deter future unlawful acts by parole agents. Agents are not only aware of the existence of search and seizure law, they are also cognizant of the rule's impact on revocation hearings and criminal trials.[22]

Similarly, the Solicitor General's assertion is not supported by empirical or other evidence. In theory, parole agents utilize various models of supervision depending on the needs of the parolee, the agent's duties, and the desires

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[22] *See, e.g.*, Parole Commission, Department of Justice, "Paroling, Recommitting and Supervising Federal Prisoners: Searches of Federal Parolees by U.S. Probation Officers," 28 C.F.R. Part 2; 56 Fed. Reg. 30870 (July 8, 1991)(Parole Commission expands search authority "in response to the concerns of U.S. Probation Officers that their supervision of certain parolees cannot be effective without more expanded search and seizure authority than the Commission has traditionally permitted"); Judd D. Kutcher, "Looking at the Law," 46 Federal Probation 55, 56 (Sept. 1982)(describing the probation officer's role in search and seizure of probationers, and noting that compliance with legal rules "should help ensure that the results of a legitimate probate [sic] officer search are admissible for revocation purposes"); Rolando V. del Carmen, "Potential Liabilities of Probation and Parole Officers" 126 (National Institute of Corrections, Aug. 1985)(reporting that "survey of field officers revealed significant concern with parole and probation conditions requiring released offenders to waive fourth amendment protections concerning searches and seizures, and with searches in the absence of waiver conditions"); *id.* at 146-47 (discussing the exclusionary rule and its relevance to parole agents: "field officers may become, in the course of their duties, the first government agents with the opportunity to secure evidence of a crime. By acting properly at that point, they can contribute to a successful law enforcement effort. Conversely, misconduct could ultimately cause an objectively guilty person to escape proper sanction").

of the community. The most prevalent model used by agents,however, is "the law enforcement model."[23] Studies and press reports of supervised release programs show that many locales embrace the law enforcement model.[24] Moreover, the claim that parole agents are free from the pressures that affect police officers is undermined by the fact that federal probation officers have themselves sought and obtained additional search and seizure authority for supervising certain federal parolees. *See* n.22, *supra*. In sum, empirical and other evidence confirms that parole agents encounter vast incentives to evade constitutional rules. In light of these incentives, the exclusionary rule is an essential remedy to encourage parole agents to observe the Constitution.

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[23] *See* Cohen & Gobert, *supra*, §8.01 at 374 ("Observers have identified three [models of supervision]: (1) the law enforcement model, where officers see their job as protecting the community through close control of the probationer or parolee; (2) the therapeutic model, where the officers focus on improving the welfare of the probationer or parolee; and (3) the synthetic model, where the officers attempt to blend the control and treatment functions. Although most agencies espouse the synthetic model, they often in practice lean more toward a control model").

[24] *See, e.g.*, Joan Petersilia, "Probation and Felony Offenders," 49 Fed. Probation 4 (June 1985)(describing close supervision regime, which require probationers to follow strict curfew rules, maintain employment, receive professional counseling, provide community service, submit to random drug testing and make restitution); Matthew Purdy, "Visits and Vigilance: Sex Offenders Shadowed by Parole Officers," N.Y. Times, June 8, 1997 (reporting extensive surveillance by parole officer of parolees; officer describes his job as "neither to exact retribution nor to offer compassion, but to keep [parolees] from committing the same crime again"); Steve Elliott, "Probation Officer Turns Up HEAT," Fresno Bee, Nov. 27, 1997 (describing joint patrols by parole officers and police; "[w]hat a probation officer brings to the HEAT team is the legal ability to search without a warrant those already on probation").

CONCLUSION

For the reasons stated above, the judgment of the Pennsylvania Supreme Court should be affirmed.

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